No. 90-350-CFX
Status: GRANTED

Title: Jeanne Farrey, fka Jeanne Sanderfoot, Petitioner
v.
Gerald J. Sanderfoot

Docketed:
August 27, 1990

Court: United States Court of Appeals
for the Seventh Circuit

Counsel for petitioner: Williamson,Brady C.

Counsel for respondent: Samson,Harvey G.

7/6: Ord. granting ext. of time to file, to and incl. 8/27, by Stevens, J. (CITED)

Entry	Date	Note	Proceedings and Orders
1	Jun 28 1990	G	Application (A90-4) to extend the time to file a petition for a writ of certiorari from June 28, 1990 to August 27, 1990, submitted to Justice Stevens.
2	Jul 6 1990		Application (A90-4) granted by Justice Stevens extending the time to file until August 27, 1990.
3	Aug 27 1990	G	Petition for writ of certiorari filed.
4	Sep 26 1990		DISTRIBUTED. October 12, 1990
5	Sep 28 1990		Waiver of right of respondent Gerald J. Sanderfoot to respond filed.
6	Oct 9 1990	P	Response requested -- BRW. (Due November 8, 1990)
7	Nov 2 1990		Brief of respondent Gerald J. Sanderfoot in opposition filed.
8	Nov 7 1990		REDISTRIBUTED. November 21, 1990
9	Nov 26 1990		Petition GRANTED.
			**********
10	Dec 17 1990	G	Motion of petitioner to dispense with printing the joint appendix filed.
11	Dec 27 1990		Record filed.
		*	Certified copy of C. A. Proceedings received.
12	Dec 27 1990		Record filed.
		*	Certified copy of original record received.
13	Jan 7 1991		Motion of petitioner to dispense with printing the joint appendix GRANTED.
14	Jan 11 1991		Brief of petitioner Jeanne Farrey, fka Jeanne Sanderfoot filed.
15	Feb 1 1991		SET FOR ARGUMENT MONDAY, MARCH 25, 1991. (2ND CASE)
16	Feb 11 1991		Brief of respondent Gerald J. Sanderfoot filed.
17	Feb 21 1991		CIRCULATED.
18	Mar 18 1991	X	Reply brief of petitioner Jeanne Farrey, f/k/a Jeanne Sanderfoot filed.
19	Mar 25 1991		ARGUED.

No. 90-350

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

IN RE GERALD J. SANDERFOOT, DEBTOR.

JEANNE FARREY, f/k/a JEANNE SANDERFOOT,
Petitioner,

v.

GERALD J. SANDERFOOT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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August 27, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

This case presents a single question of federal law, one that has split the Courts of Appeals, based on undisputed facts:

Does the federal bankruptcy code give an individual debtor the unilateral right to avoid a lien granted the debtor's spouse against the family homestead by a state divorce court as a condition of its award of the homestead's title to the debtor?

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GERALD J. SANDERFOOT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Jeanne Farrey petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Seventh Circuit entered in this case on March 30, 1990.

OPINIONS BELOW

The 2-1 opinion of the Court of Appeals is reported at 899 F.2d 598, reprinted in the appendix ("App.") to this petition. App., pp. 1a-21a.

The decision of the U.S. District Court for the Eastern District of Wisconsin (Gordon, J.), which the Court of Appeals affirmed, is reported at 92 B.R. 802. App., pp. 22a-24a.

The decision of the U.S. Bankruptcy Court for the Eastern District of Wisconsin (McGarity, J.), which the District Court reversed, is reported at 83 B.R. 564. App., pp. 25a-38a.

The Findings of Fact, Conclusions of Law, and Judgment of Divorce rendered by the Circuit Court for Outagamie County, Wisconsin, have not been reported. Portions of this material are reprinted in the appendix. App., pp. 49a-61a.

JURISDICTION

The Court of Appeals entered its judgment on March 30, 1990. On July 6, 1990, in response to a motion timely filed by the petitioner, Justice Stevens ordered that the time for filing this petition be extended to and include August 27, 1990. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

11 U.S.C. § 522 provides in part:

Exemptions.

(b) . . . an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection . . . . Such property is—

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under . . . State or local law that is applicable on the date of the filing of the petition . . . .

* * * *

(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

(1) a judicial lien. . . .

11 U.S.C. § 101 provides in part:

Definitions. In this title—

* * * *

(32) "judicial lien" means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding;

(33) "lien" means charge against or interest in property to secure payment of a debt or performance of an obligation.

STATE STATUTE INVOLVED

Wis. Stat. § 815.20. *Homestead exemption definition.*

(1) An exempt homestead . . . selected by a resident owner and occupied by him or her shall be exempt from execution, from the lien of every judgment and from liability for the debts of the owner to the amount of $40,000, except mortgages, laborers', mechanics' and purchase money liens and taxes and except as otherwise provided. . . .

STATEMENT OF THE CASE

Nature of the case. With its decision, the U.S. Court of Appeals for the Seventh Circuit has created an even division among the Circuits on this question of law, a question that inevitably will affect many of the 1.2 million divorces granted every year in this country. The bankruptcy code now can be used to defy state divorce law, threatening the financial well-being of every spouse awarded a lien by a divorce court to secure his or her share of the marital estate. The result is, in the words of Judge Richard Posner's dissent, "a perversion of bankruptcy law" that "offends the moral sense of laymen" by permitting a debtor spouse to manipulate federal law "to steal from his former wife." App., pp. 18a-20a.

The disagreement among the Circuits on the issue runs deep. The Seventh and the Ninth will permit a debtor to invoke the bankruptcy code to avoid a lien against an exempt homestead awarded the non-debtor spouse in a

divorce decree; the Eighth will not, and the Tenth almost always will not. Without a consensus on the question, more divorce cases will be contested and ultimately decided not in the state courts under state law but in the bankruptcy courts under federal law. To nullify a divorce judgment's property division, escaping financial responsibility, the party awarded the family homestead need only file a petition for bankruptcy to avoid, unilaterally and automatically, the homestead lien awarded the party's former spouse in the same judgment.

When divorce courts divide the marital estate, they commonly award one party sole title to the family home and the other party property of equal value. If there are few readily divisible assets, however, courts often order the party awarded the homestead to make cash payments to balance the scale, imposing a lien on the real property to secure those payments. The state courts that resolve property disputes and, no less, the parties themselves need to know if those liens, far from providing "security," offer an invitation to bankruptcy for one spouse and to financial ruin for the other.

The issue has the potential to arise as often as divorced men and women can file for bankruptcy. The Circuits are in conflict. Only this Court, by resolving the question, can ensure certain and equal treatment with an appropriate construction of the federal bankruptcy law that preserves the states' ability to distribute marital property fairly when they dissolve marriages.

Statement of facts. The facts of this case are undisputed. Jeanne Farrey and Gerald Sanderfoot married on August 12, 1966. They eventually bought a home, jointly, on 27 acres of land in Hortonville, Wisconsin, where they raised their three children. On September 12, 1986, more than 20 years after their marriage, they were divorced. App., pp. 49a-61a. The Outagamie County Circuit Court's divorce judgment, entered on February 5, 1987, awarded

each party precisely one-half of their $60,600.68 net marital estate. *Id.* at 61a.

For her share, Ms. Farrey received a small amount of personal property and one-half of the proceeds of a court-ordered auction of other property. The court gave Mr. Sanderfoot the family home and land, which it valued at $104,000.00, and all of the remaining personal property, including two cars and a business. *Id.* at 51a. The court decree also allocated the couple's liabilities. After this initial assignment of assets and debts, Mr. Sanderfoot had a net estate of $59,508.79. Ms. Farrey had $1,091.90. *Id.* at 60a-61a.

To equalize the property division pursuant to state law, the trial court awarded Ms. Farrey half of the difference in their net estates, $29,208.44, ordering Mr. Sanderfoot to pay her that amount in two equal installments—the first due on January 10, 1987, the second on April 10, 1987. To secure that debt and ensure the equal division of their property, the court awarded Ms. Farrey, at the same time and in the same divorce decree, a lien against the family home. *Id.* at 57a. The judgment also ordered Mr. Sanderfoot to pay child support, maintenance, and the parties' attorneys' fees.

On May 4, 1987, just three months after the divorce judgment, Mr. Sanderfoot filed a Chapter 7 bankruptcy petition. *Id.* at 44a. By then, he still had not "complied with a single order of the state court." *In re Sanderfoot*, 83 B.R. 564, 565 (Bankr. E.D. Wis. 1988), App. at 26a. The facts were undisputed, the bankruptcy court noted, and Mr. Sanderfoot's conduct clear:

> He had not conducted the auction, delivered the personal property to his ex-wife, or made a single payment toward child support, maintenance or attorney fees. He had not made the cash payments that were ordered by the court to be made to his ex-wife as compensation for her interest in the [homestead] property.

Id. Mr. Sanderfoot listed the marital home on the schedule of assets filed with his bankruptcy petition, App. at 48a, designating the family's home as exempt homestead property under Wis. Stat. § 815.20.[1]

Procedural history. Mr. Sanderfoot then filed a motion under 11 U.S.C. § 522(f)(1) asking the bankruptcy court to permit him to avoid Ms. Farrey's lien against the property because it was a judicial lien that impaired his homestead exemption.[2] Ms. Farrey objected, claiming that the lien had never "fix[ed]" to Mr. Sanderfoot's interest in the exempt homestead. The bankruptcy court denied Mr. Sanderfoot's motion. 83 B.R. at 571, App. at 38a; ~~*see id.* at~~ 39a.

The court reviewed the statute's legislative history to determine the purpose of the lien avoidance statute. "[T]he policy behind 11 U.S.C. § 522(f)(1) was not to circumvent a divorce court's decision," it concluded, but to allow the debtor to prevent creditors from destroying statutory exemptions by bringing legal action against the debtor shortly before bankruptcy. App. at 28a. The "fixing of a lien on an interest of the debtor," the bankruptcy court found, had never occurred to trigger the avoidance statute:

> In this case, regardless of how title was previously held, the debtor acquired his interest by virtue of the divorce judgment and subject to the lien. The lien did not attach to the debtor's interest, and it is accordingly not avoidable.

Id. at 33a.

Mr. Sanderfoot appealed the bankruptcy court's order to the U.S. District Court for the Eastern District of Wisconsin under 28 U.S.C. § 158. The district court reversed the bankruptcy court's decision and permitted Mr. Sanderfoot to avoid the lien. *In re Sanderfoot*, 92 B.R. 802 (E.D. Wis. 1988), App. at 22a-24a. It rejected the bankruptcy court's conclusion that the lien had not attached to the debtor's property.

Instead, the district court found that the divorce judgment had extinguished all of the previous property interests held by the parties, creating new interests: Mr. Sanderfoot received the home, Ms. Farrey a lien against it. Thereafter, when Mr. Sanderfoot filed for bankruptcy, section 522(f)(1) allowed him to avoid the "judicial lien" that had "fix[ed]" against his property interest. *Id.* at 24a. The district court made no reference to the statute's legislative history or purpose.

Ms. Farrey appealed to the U.S. Court of Appeals for the Seventh Circuit, which affirmed the district court's decision. *In re Sanderfoot*, 899 F.2d 598 (7th Cir. 1990), App. at 1a-21a. After acknowledging the "difficulty" of the issue and the conflicting decisions in other circuits, *id.* at 5a, the court's majority found that the divorce judgment had conveyed title to the family's home to Mr. Sanderfoot. Ms. Farrey's lien against the property, obtained by "legal proceedings," fit the unambiguous definition of "judicial lien" in 11 U.S.C. § 101(32), and that made it avoidable under 11 U.S.C. § 522(f)(1). *Id.* at 11a. Like the district court, the Court of Appeals' majority ignored the statute's legislative history and purpose.

In a sharply-worded dissent, Judge Posner said the majority had misunderstood the lien-avoidance provision

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[1] Wis. Stat. § 815.20 provides:

Homestead exemption definition.

(1) An exempt homestead . . . selected by a resident owner and occupied by him or her shall be exempt from execution, from the lien of every judgment and from liability for the debts of the owner to the amount of $40,000, except mortgages, laborers', mechanics' and purchase money liens and taxes and except as otherwise provided. . . .

[2] Neither Mr. Sanderfoot nor the trustee attempted to rely on the bankruptcy code's preference provisions to "avoid any transfer of an interest of the debtor in property—. . . ." 11 U.S.C. § 547(b).

and allowed the bankruptcy code to become a "tool by which bounders defraud their spouses." *Id.* at 18a. He maintained that the correct statutory interpretation would not avoid the lien but, rather, "do justice here without deforming the Bankruptcy Code." *Id.* at 20a. Since the lien "was created in the same document" that gave the husband title to the property, the dissent concluded, the "lien qualified that interest from the start. There was no instant at which [Mr.] Sanderfoot owned the property free and clear of the wife's interest." *Id.* at 21a. Mr. Sanderfoot did not have sole title to the property when the court awarded Ms. Farrey a lien on it and, accordingly, the lien was not avoidable.

Basis for federal jurisdiction. The U.S. Bankruptcy Court for the Eastern District of Wisconsin exercised jurisdiction over this matter pursuant to 28 U.S.C. § 157 after the debtor filed his Chapter 7 petition. The U.S. District Court for the Eastern District of Wisconsin heard the appeal from the decision of the bankruptcy court under 28 U.S.C. § 158. No jurisdictional issues have been raised at any point in this case.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S DECISION TO PERMIT A SPOUSE TO AVOID A HOMESTEAD LIEN, AWARDED TO THE OTHER SPOUSE IN A DIVORCE DECREE, CONFLICTS WITH DECISIONS IN TWO OTHER CIRCUITS.

There is now an even split in the four Circuits that have considered this issue. In divorce/bankruptcy cases with virtually identical facts, the Seventh and Ninth Circuits have held judicial liens avoidable while the Eighth and Tenth Circuits have found they are not.[3] As a result, the courts that invariably must consider the issue—state divorce courts, bankruptcy courts, and district courts—"wade into waters muddied before [them] with little hope of settling anything but the instant dispute."[4] This conflict, which has far-reaching ramifications for both the state and federal courts, can be resolved definitively only by this Court.

Just how "muddy" the waters have become is apparent not only from the conflicting results in the cases but from their disparate reasoning. The courts that have found the liens non-avoidable are particularly divided in approach. The predominant "survival" theory,[5] based on a "pre-existing property right," has been advanced by the Eighth Circuit. In *Boyd v. Robinson*, 741 F.2d 1112 (8th Cir. 1984), the court refused to invalidate the lien because it had not attached to the debtor's interest in the property. "[The lien] simply recognized, and provided a remedy to enforce, a pre-existing property right in the marital home." *Id.* at 1115.

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[3] *Compare In re Sanderfoot*, 899 F.2d 598 (7th Cir. 1990), App. at 1a, and *In re Pederson*, 875 F.2d 781 (9th Cir. 1989), *with In re Borman*, 886 F.2d 273 (10th Cir. 1989), *In re Donahue*, 862 F.2d 259 (10th Cir. 1988), and *Boyd v. Robinson*, 741 F.2d 1112 (8th Cir. 1984).

[4] *In re Rittenhouse*, 103 B.R. 250, 252 (Bankr. D. Kan. 1989).

[5] *Id.*

The decisions that have adopted this concept, including the bankruptcy court decision reversed here, have cited a variety of sources. The court in *Boyd* relied on a state law that recognized a spouse's general property interest in homestead property acquired during the marriage with marital assets. 741 F.2d at 1114. Other courts have found the pre-existing property right in the divorce judgment itself because it conveys the exempt homestead property to the debtor-spouse while it simultaneously creates a lien for the other spouse.[6] Since the debtor-spouse never has the property without the lien, the lien never "attaches" to an unencumbered interest of the debtor.[7]

The Tenth Circuit has adopted a different approach: liens acquired in a divorce decree are not "judicial liens" at all but equitable liens immune from avoidance under section 522(f)(1). In its two most recent decisions,[8] *In re Borman* and *In re Donahue*, *supra* at 9 n 3, the Tenth Circuit held that the property awarded the debtor-spouse was intended to generate the proceeds from which the debt to the lien holder spouse ultimately would be paid. Allowing avoidance, permitting the debtor-

[6] *In re Sanderfoot*, 83 B.R. at 568, App. at 30a; *see also* Wis. Stat. § 766.31 (spouses have equal undivided interests in property earned or acquired during marriage).

[7] *See In re Rittenhouse*, 103 B.R. at 253-54. The *Sanderfoot* divorce decree stated that "[a]ll property and money received or retained by the parties shall be the separate property of the respective parties, free and clear of any right, title, interest, or claim of the other party, and each party shall have the right to deal with and dispose of his or her separate property as fully and effectively as if the parties had never been married, *except as expressly provided for in this* [*order*]. . . ." (Emphasis added.) App. at 58a.

[8] In an earlier case, *Maus v. Maus*, 837 F.2d 935 (10th Cir. 1988), the Tenth Circuit had found a lien avoidable because the divorce decree had awarded the property to the debtor-spouse "free and clear of any and all claims" of the creditor spouse. *Id.* at 937. In *Borman* and *Donahue*, however, the Tenth Circuit confined *Maus* to its particular facts. *Borman*, 886 F.2d at 274; *Donahue*, 862 F.2d at 265.

spouse to escape that obligation, would unjustly enrich the debtor. *See, e.g., Borman*, 886 F.2d at 275; *see also Hart v. Hart (In re Hart)*, 50 B.R. 956, 960-61 (Bankr. D. Nev. 1985).

Yet another survival theory employed by some bankruptcy courts assumes that the lien is not really a "lien" at all but, rather, a security interest in the property.[9] This approach necessarily is limited by the bankruptcy code's definition of a "security interest" in 11 U.S.C. § 101(45) as a "lien created by agreement." The "security interest" rationale has real force, accordingly, only when the division of property in the divorce somehow can be construed as "by agreement" rather than as judicially-imposed.

The Ninth Circuit, joined now by the Seventh, has decided that the liens granted in divorce judgments are judicial liens, that they attach to a property interest of the debtor-spouse, and that section 522(f)(1) permits the liens to be avoided.[10] While both Courts of Appeals acknowledged the harsh results of their decisions, *Sanderfoot*, 899 F.2d at 605, App. at 16a; *Pederson*, 875 F.2d at 784, they found the language of the statute unambiguous—leaving no choice, they said, but to find the liens avoidable:

> Like the Ninth Circuit, we therefore respectfully decline to follow *Boyd*. We conclude that *Pederson* and its progeny are better reasoned and faithful to the plain language of section 522(f).

App. at 10a.

[9] *Wicks v. Wicks (In re Wicks)*, 26 B.R. 769, 771-72 (Bankr. D. Minn. 1982); *Cowan v. Cowan (In re Scott)*, 12 B.R. 613, 617-18 (Bankr. W.D. Okla. 1981).

[10] *In re Sanderfoot, supra*, App. at 1a; *In re Pederson, supra*; *see also In re Duncan*, 85 B.R. 80, 82-83 (W.D. Wis. 1988) (finding "unpersuasive" the argument that the lien against the marital home awarded in a divorce judgment was an equitable mortgage or any other type of non-judicial lien).

In this case, the dissenting judge found the "plain language" of the statute ambiguous, yet the intent of Congress clear: "to thwart unsecured creditors who, sensing impending bankruptcy, rush into court to obtain liens on exempt property, thus frustrating the purpose of the [statutory] exemptions." *Id.* at 18a. The lien imposed on the Farrey-Sanderfoot home was designed to preserve the pre-existing property right of the ex-spouse, not to enable a creditor to defeat a debtor's homestead exemption. Accordingly, Judge Posner maintained, the lien-avoidance provision should not be applicable. *Id.*

The waters are muddy indeed. The status of a lien imposed against the family home to secure a spouse's obligations in a divorce decree remains uncertain. Only this Court can reconcile the conflicting decisions and the conflicting reasoning.

II. THE UNCERTAINTY SURROUNDING THE APPLICATION OF THE BANKRUPTCY LAW HAS A SIGNIFICANT IMPACT ON STATE AND FEDERAL COURTS AND ON COUNTLESS DIVORCE LITIGANTS.

The final disposition of this case will determine whether Jeanne Farrey ever will receive the equal distribution of property ordered by the state court or whether she will receive virtually nothing. If the Court of Appeals' decision stands, however, it will have a devastating impact on far more than just Jeanne Farrey. In 1988, the state courts of this country granted almost 1.2 million divorces.[11] Although the annual rates of divorce vary, half of all marriages end in divorce. All of these divorces, whether they involve the rich or the poor, inevitably divide the parties' property. Some divorces will be consensual, judicially approved but not imposed, and the parties by stipulation will execute notes and

[11] U.S. Department of Commerce, *Statistical Abstract of the United States* 89 (1990).

mortgages to secure a distribution that should not be avoidable in bankruptcy. Many divorces, however, will be contested.

A. The Seventh Circuit's Decision Will Severely Handicap The State Divorce Courts.

The division of a family's property often leads to bitter conflict in divorce.[12] It is often necessary for a divorce court dividing the marital estate to award exempt property to one spouse and give the other spouse a lien on that property to ensure the performance of the financial obligations imposed by the divorce judgment. *In re Sanderfoot*, 899 F.2d at 605, App. at 16a.[13] Indeed, every case cited in the Seventh Circuit's decision involved just those facts, varied only by the language of the divorce judgments themselves. Courts use the lien either to secure the lien holder's pre-divorce interest until the home eventually can be sold or to ensure an equitable division of assets when the spouse awarded the home does not have enough ready cash to pay the spouse who must leave it.

For most families, the home is the principal—if not the only—asset of real value. Accordingly, a homestead lien often provides the departing spouse the only practical guarantee that he or she actually will receive the cash or other assets awarded by the divorce judgment. Under the decisions of the Seventh and Ninth Circuits, however, every divorce decree, of the 1.2 million granted annually, that employs a judicially-awarded lien now comes with a price: the very real possibility that the debtor-spouse will file for bankruptcy to avoid the lien.

The divorce courts award liens because they are a well-established, practical and effective tool for dividing

[12] Santelmann, *Divvying Up Before You Split*, 144 Forbes 276 (Nov. 27, 1989).

[13] *See also In re Worth*, 100 B.R. 834, 837 (Bankr. N.D. Tex. 1989).

marital property. To the parties and the state courts mandated by law to make equitable property distributions on divorce,[14] the status of those liens is not an abstract legal question. A property division theoretically "equal" at the time of the divorce may become grossly inequitable just weeks, or even moments, later if the debtor-spouse can avoid the lien by filing for bankruptcy. That is precisely what happened to Jeanne Farrey.

The law of divorce and the law of bankruptcy already share a complex, symbiotic relationship. State divorce laws seek to divide marital property to reflect the marital partnership and to protect dependent spouses and children. Federal bankruptcy law seeks to give a bankrupt debtor a fresh start. The bankruptcy code attempts to balance the state and federal objectives by providing that the child support, alimony, and maintenance obligations of a debtor are not dischargeable.[15] By allowing the debtor to avoid a lien awarded his ex-spouse in their divorce judgment, the Seventh Circuit in this decision has made the complex bankruptcy-divorce relationship impenetrable and, more importantly, upset a balance explicitly struck by Congress and the states.

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[14] Forty-two states and the District of Columbia have equitable distribution laws. Wis. Stat. § 767.255 requires a court, for example, to "presume" that "property is to be divided equally between the parties. . . ."

[15] 11 U.S.C. § 523(a)(5):

> (a) A discharge under . . . this title does not discharge an individual debtor from any debt. . .
>
> * * * *
>
> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record or property settlement agreement, but not to the extent that. . .
>
> * * * *
>
> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

Some property awards may be dischargeable in bankruptcy, but that possibility—far from providing support for the Seventh Circuit's decision—undercuts it. The determination of dischargeability is a matter for the bankruptcy court, not the debtor. The avoidance provision, by contrast, is virtually automatic. As the Seventh and Ninth Circuits have construed it, the statute also prohibits the imposition of a judicial lien to secure nondischargeable obligations like child support. In addition, many state courts no doubt impose a lien on exempt property "knowing" that interest could *not* be discharged. *See In re Sanderfoot*, 83 B.R. at 566, App. at 27a.

Without the ability to award a non-avoidable lien, divorce courts now will have few practical alternatives for ensuring that a marital estate will be distributed equitably. A state court could order the homestead immediately sold with the proceeds divided appropriately. Yet that would result, needlessly in many cases, in forcing children from their family home regardless of the family's financial status or which parent has custody. It would destroy, moreover, the very rationale for a homestead exemption.

In theory, a court alternatively could order the title to the homestead held jointly by both spouses. But that would deprive the spouse who left the homestead of the liquid assets necessary to establish a new home. It also would leave the home's maintenance and control divided between two people who had terminated their partnership. Finally, a divorce court could order the debtor-spouse to execute a mortgage but, as the Seventh Circuit's majority itself recognized, that probably would not meet the bankruptcy code's definition in 11 U.S.C. § 101(45) of a "security interest." 899 F.2d at 604 n.17, App. at 14a. The lien would remain avoidable. *Id.* at 15a. Moreover, it would create just the kind of "havoc" the Seventh Circuit fears by permitting state divorce law to vary federal bankruptcy law. *Id.*

B. The Application Of The Lien-Avoidance Provision To A Divorce Judgment Invades The Province Of The States.

It is well-established that domestic relations "has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). And so has the need to protect families from financial devastation, in or out of bankruptcy, through state statutory exemptions that shield some assets from creditors. In enacting the bankruptcy code, Congress recognized those interests through section 523(a)(5) and the complementary provision of section 522(b) that permits a debtor to elect the state's statutory exemptions in bankruptcy. *See generally, In re Sullivan*, 680 F.2d 1131 (7th Cir. 1982), *cert. denied*, 459 U.S. 992 (1982).

It is particularly ironic that Mr. Sanderfoot invoked Wisconsin's homestead exemption to avoid this lien. The purpose of that exemption, enacted in the first session of the state legislature, Wis. R.S. ch. 102, §§ 51-52, 56, 59 (1849), is to provide families "with the right to enjoy the comforts of home life free from claims of creditors."[16] In *Warsco v. Oshkosh Sav. and Trust Co.*, 190 Wis. 87, 208 N.W. 886 (1926), the Wisconsin Supreme Court described the public policy underlying the homestead exemption statute:

> [I]t is proper [that each citizen] should have a home where his family may be sheltered, and live beyond the reach of financial misfortune and the demands of creditors . . . . [The exemption] is intended to secure to the householder a home for himself and his family. . . . Such protection extends not only to the owner of the homestead, but to his wife and family and it shelters them in the event of financial embarrassment.

[16] Comment, *Homestead Exemption Interests*, 1981 Wis. L. Rev. 697, 705.

Id. at 93; *see also Schwitzke v. American Nat'l Bank*, 242 Wis. 521, 526-27, 8 N.W.2d 303, 305 (1943). The purpose of the exemption is to protect the debtor *and* his family from creditors, not to provide the debtor with a fail-safe device to deny his family the benefits of their property.

In *Wozniak v. Wozniak*, 121 Wis. 2d 330, 359 N.W.2d 147 (1984), the Wisconsin Supreme Court held that a real estate lien, awarded to secure payment of a divorce judgment, was a mortgage lien that survived the death of a joint tenant.[17] The court concluded that " '[t]he purpose of the instrument is the controlling feature under all circumstances. If that is security . . . , the instrument is treated as a mortgage and nothing else.' " *Id.* at 336, quoting *Smith v. Pfluger*, 126 Wis. 253, 256, 105 N.W. 476 (1905). Under Wisconsin law, then, Ms. Farrey's lien, though imposed by a judge, is a mortgage. And it should have the same status as the two other mortgages of record against the family home. *See* App. at 47a. Under the Seventh Circuit's decision, however, Ms. Farrey's lien has no status at all.[18]

The Wisconsin homestead exemption, applicable under 11 U.S.C. § 522(b), protects up to $40,000.00 of equity in a home, but it does *not* exempt "mortgages, laborers', mechanics' and purchase money liens and taxes. . . ." Wis. Stat. § 815.20. Mr. Sanderfoot's decision to file for

[17] The court found it clear from the divorce judgment that the trial court "intended to give William Wozniak a security interest in the specific property. . . . This court has previously stated that a transfer of property as security, *regardless of the form thereof*, is a mortgage." 121 Wis. 2d at 336 (citations omitted) (emphasis added).

[18] Like a mortgage, the Sanderfoot divorce judgment was recorded in the office of the register of deeds in Outagamie County as required by Wis. Stat. § 767.255: "the portion of the [divorce] judgment which affects title to real estate shall be recorded in the office of the register of deeds of the county in which the lands so affected are situated."

bankruptcy surely does not affect the secured interest of the financial institution that lent the money to buy the property in 1979. Yet, the Seventh Circuit's majority has decided, that same bankruptcy petition avoids the secured interest of Jeanne Farrey who, for more than 20 years, shared a marriage and a family with him. Through the bankruptcy law, Mr. Sanderfoot has used the Wisconsin homestead exemption, an exemption intended to protect both him and Ms. Farrey from creditors, to eliminate her interest in the family's home.

The uncertainty surrounding this issue has a collateral, if less tangible, effect. The Congress and the courts suffer from a public perception that they have passed or affirmed laws that are "unfair" and that they are blind to the practical implications of their decisions. This is especially true in the area of domestic litigation, where many people have their only contact with the judicial system:

> [There is a] pervasive dissatisfaction . . . with what [the] courts do. It is almost universally thought that . . . in dividing property domestic courts behave in a high-handed, arbitrary, and unjust way. Part of that complaint is a response to the relative poverty, inconvenience, and emotional voids that divorce creates. Another more justified part comes from our lack of consensus about what constitutes fairness and justice in domestic matters. A court cannot do justice unless it has some clear guidance about what justice is. At the moment, that guidance is lacking.[19]

Justice, fairness and guidance, as the dissenting opinion observed, are little in evidence in this case.

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[19] R. Neely, *The Divorce Decision: The Legal and Human Consequences of Ending a Marriage* 4 (1984).

III. THE SEVENTH CIRCUIT ERRED, AS A MATTER OF LAW, BY CONSTRUING 11 U.S.C. § 522(f)(1) WITHOUT REGARD FOR THE INTENT OF CONGRESS.

The trial court awarded Ms. Farrey property with a net value of $1,091.90 while her husband received $59,508.79 in property including the family's home. To achieve the equal property distribution presumptively required by Wisconsin law, the court ordered Mr. Sanderfoot to pay his wife half of the difference in two installments over the next seven months. She received a lien against their former home to secure those payments. Three months later, having complied with not one of the financial obligations imposed by the divorce decree, Mr. Sanderfoot filed for bankruptcy and moved to avoid her lien—the only interest she retained in the family's marital assets.

Sometimes courts have to make decisions that offend "the moral sense of laymen," Judge Posner wrote, and that "does not prove a decision wrong. Institutional or systemic considerations, themselves morally significant, but invisible to the laity, may outweigh the tug of simple justice. But they do not do so here." 899 F.2d at 606, App. at 17a. The statute *is* ambiguous, he concluded, and justice requires its interpretation consistent with both common sense and the intent of Congress.

The Seventh Circuit's majority began its analysis of section 522(f)(1) by acknowledging the disparate results reached by the courts that had interpreted the statute. *Id.* at 600, App. at 5a. It then decided that the language of the statute was clear, adopting the reasoning of the Ninth Circuit in *Pederson*, 875 F.2d 781: the lien attached to the debtor-spouse's property, not to the lien holder's pre-existing property right. The court characterized as "strained" the rationale of *Boyd* and its progeny, which had interpreted the same statute but come to the opposite conclusion. 899 F.2d at 605, App. at 15a.

It is difficult to accept the court's conclusion that the statute's language and meaning somehow are "plain," facially unambiguous, when so many courts have interpreted it so differently. A statute is ambiguous if it is capable of being construed in different ways by reasonably well-informed people. Indeed, "[t]he fact that a statute has been interpreted differently by different courts has been cited as evidence that the statute is ambiguous and unclear." [20]

Does the term "judicial lien" in 11 U.S.C. § 101(32) encompass liens in divorce judgments? Does the phrase "fixing of a lien" in 11 U.S.C. § 522(f)(1) describe the simultaneous imposition of a lien with a property award? The answer to those questions lies neither in the Code's text or its context. Yet, the Seventh Circuit's majority summarily dismissed as "implausible and unsupported by the language of the Code" twelve separate decisions by other bankruptcy courts and Courts of Appeals that disagreed with it. 899 F.2d at 604 & n.14, App. at 13a.

The majority refused to look beyond the statute's "plain meaning" despite its "seemingly inequitable results in a divorce setting." Feeling compelled to "give effect to the policy decisions embodied in the express language," *id.* at 15a, the Seventh Circuit decided the case without ever penetrating the surface of the statute. It determined the "clear legislative intent" of Congress, *id.* at 16a, without ever taking into account the statute's legislative history and purpose.

Even were the language as "plain" as the Seventh Circuit has suggested, however, that does not end the inquiry. An appellate court should set aside the "strict language" where the " 'literal application of a statute will produce a result demonstrably at odds with the intention of the drafters. . . .' " (citation omitted). *United States*

[20] 2A C. Sands, *Sutherland on Statutory Construction*, § 46.04 (4th ed. 1984) ("Sutherland").

v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989), cited with approval, *In re Sanderfoot*, 899 F.2d at 600, App. at 6a. Moreover, when a statute "contains latent ambiguities despite its superficial clarity, the court may turn to the legislative history . . . for guidance." [21] The Seventh Circuit's majority ignored those admonitions, and the result, in the words of the dissenting judge, is "a perversion of bankruptcy law." 899 F.2d at 606, App. at 18a.

The purpose of section 522(f)(1) "appears unmistakably from legislative history the purport and significance of which are unquestioned"—to prevent unsecured creditors from obtaining judicial liens as soon as they learn a debtor is about to file for bankruptcy, thereby frustrating the exemptions allowed by the bankruptcy code and state law. *Id.* The lien-avoidance provision "allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists to provide relief for an overburdened debtor. If a creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions."[22]

The lien in this case was not created to permit an unsecured creditor to defeat a debtor's exemption. The divorce court awarded it to secure an obligation the court imposed on the debtor-spouse to his wife in exchange for the court's award of the homestead to the debtor. The lien did not arise in the context of impending bankruptcy but during a divorce where "the relationship of the parties . . . is not a debtor-creditor relationship. . . . This distinction is crucial. It is clear that Congress intended to include within the ambit of sec. 522(f)(1) only those lien interests created in favor of creditors, not spouses."[23]

[21] Sutherland § 46.04 (4th ed. 1984 and Supp. 1990).

[22] H.R. Rep. No. 595, 95th Cong., 1st Sess. 126 (1977).

[23] *In re Thomas*, 32 B.R. 11, 12 (Bankr. D. Or. 1983).

The Seventh Circuit based its decision on the familiar principle that it is for Congress, not the courts, to make policy. When Congress has made a decision, the courts must respect its judgment. 899 F.2d at 605, App. at 16a. But the court ignored Congress's very purpose in enacting the statute. In the words of the dissent, it is difficult "to understand why we should . . . ignore the purpose of the lien-avoidance statute in order to achieve a result that does not promote, but instead denies, simple justice—laymen's justice." *Id.* at 19a-20a.

The Seventh Circuit's analysis was flawed in yet another fundamental way. Section 522(f)(1) allows a debtor to avoid the "fixing of a lien on an interest of the debtor in property." In other words, a debtor can avoid a lien that attaches after he acquires the interest in the property. He cannot avoid a lien if he acquired the property *subject* to the lien.[24]

In this case, the divorce judgment simultaneously awarded the family home to Mr. Sanderfoot and the lien to Ms. Farrey. Before the divorce decree—before the lien—Mr. Sanderfoot had at best only an undivided one-half interest in the home. In effect, Mr. Sanderfoot received Ms. Farrey's interest in the home subject to her lien against that interest. He obtained the title and the lien together. The conclusion of the district court and the Seventh Circuit that Ms. Farrey's lien somehow attached to Mr. Sanderfoot's sole interest in the home, a sole interest he never had, is in error.

The state divorce laws and the federal bankruptcy law can be reconciled fairly to stand together. The Seventh Circuit's decision, however, does not do that. Rather, it applies the statute in a way that frustrates both the intent of the federal bankruptcy law and the state divorce laws. Ms. Farrey does not ask this Court to amend the bankruptcy code:

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[24] *In re McCormick*, 18 B.R. 911 (Bankr. W.D. Pa. 1982).

> [She is] not asking [the Court] to disregard the purpose of Congress, but to fulfill it by adhering to the precise contours of the lien-avoidance section. She is asking [the Court] not to disregard Congress's words, but to apply them. She is asking not for a complex rule or vague standard but for a straightforward distinction between a judicial lien on the bankrupt's property and a judicial lien intended to secure a spouse's preexisting interest in marital property.

899 F.2d at 607, App. at 20a.

The Seventh Circuit now has told Jeanne Farrey that she has to stand in line with Mr. Sanderfoot's other unsecured creditors to await the outcome of the bankruptcy. She has been told that her 20-year contribution to the marriage, recognized by the divorce judgment, is "simply irrelevant" because it was "extinguished" by the bankruptcy code. *See id.* at 10a. The court has permitted Mr. Sanderfoot to use the bankruptcy code and the state exemptions in a way neither Congress nor the states ever intended: as a "tool by which bounders defraud their spouses" and as a means to "steal from his former wife." *Id.* at 18a, 20a. He has been allowed the fresh start intended by the bankruptcy code not only with his own property intact but with Ms. Farrey's property as well. The Seventh Circuit was wrong.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari. The conflicts that exist among the Courts of Appeals should be resolved because of the severe consequences that will persist if they are not.

Respectfully submitted,

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August 27, 1990

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 88-3148

IN RE GERALD J. SANDERFOOT,
Debtor.

JEANNE FARREY, f/k/a JEANNE SANDERFOOT,
Objector-Appellant,
v.

GERALD J. SANDERFOOT,
Debtor-Appellee.

Argued Sept. 28, 1989

Decided March 30, 1990

Charles J. Hertel, David Crist, Dempsey, Magnusen, Williamson & Lampe, Oshkosh, Wis., for objector-appellant.

Harvey G. Samson, Bollenbeck, Block, Seymour, Rowland & Samson, Appleton, Wis., for debtor-appellee.

Before POSNER and RIPPLE, Circuit Judges, and ESCHBACH, Senior Circuit Judge.

RIPPLE, Circuit Judge.

Jeanne Farrey, formerly known as Jeanne Sanderfoot, appeals from the district court's order reversing the bank-

ruptcy court's determination that Gerald Sanderfoot could not avoid, pursuant to 11 U.S.C. § 522(f), a lien held by Ms. Farrey on Mr. Sanderfoot's homestead property. Because we agree with the district court that the lien is avoidable, we affirm.

I

BACKGROUND

A. *Facts*

Jeanne and Gerald Sanderfoot were married on August 12, 1966. The Wisconsin Circuit Court for Outagamie County granted a judgment of divorce and property division on September 12, 1986, and entered a written judgment of divorce on February 5, 1987. The court awarded Ms. Farrey half the refund and/or liability with respect to the couple's 1985 income taxes, certain personal property, and half the proceeds of items ordered sold at auction. The marital home, valued by the court at $104,000.00, and all remaining personal property were awarded to Mr. Sanderfoot.[1]

After all assets and debts were assigned to the parties, Ms. Farrey was left with a net estate of $1,091.90, while Mr. Sanderfoot had a net estate of $59,508.79. To achieve a more appropriate distribution, the court ordered Mr. Sanderfoot to pay Ms. Farrey $29,208.44. Mr. Sanderfoot was to pay half that amount ($14,604.22) on or before January 10, 1987; the remaining portion was due on or before April 10, 1987. To secure this debt, the court awarded Ms. Farrey a lien against the home to remain attached until the debt was paid in full.[2] Mr. Sanderfoot

[1] The court stated: "*Real Estate—House.* The Court awards the real estate—house to the Respondent herein [Gerald Sanderfoot] for $104,000.00." R. 14 Ex.B at 9.

[2] The court ordered that "[t]he Petitioner herein [Ms. Farrey] shall have a lien against the real estate property of the Respondent for the total amount of money due her pursuant to this Order of the Court, i.e. $29,208.44, and the lien shall remain attached to the real estate property of the Respondent until the total amount of money is paid in full." R.14 Ex.B at 14.

has not yet paid any part of the debt. Accordingly, Ms. Farrey has not relinquished her record title interest in the property.

Mr. Sanderfoot voluntarily filed for Chapter 7 bankruptcy on May 4, 1987, and listed the residential home on his schedule of assets. He identified the real estate as his homestead and claimed it was exempt property pursuant to Wis.Stat. § 815.20.[3]

B. *The Bankruptcy Court*

Pursuant to 11 U.S.C. § 522(f)(1),[4] Mr. Sanderfoot moved to avoid the lien against his property. Ms. Farrey

[3] Wis.Stat .§ 815.20 provides in relevant part:

Homestead exemption definition

(1) An exempt homestead as defined in s.990.01(14) selected by a resident owner and occupied by him or her shall be exempt from execution, from the lien of every judgment and from liability for the debts of the owner to the amount of $40,000, except mortgages, laborers', mechanics' and purchase money liens and taxes and except as otherwise provided. . . . The exemption extends to the interest therein of tenants in common, having a homestead thereon with the consent of the cotenants, and to any estate less than a fee.

A debtor may not exempt an amount greater than his equity in the home, even if that amount is less than $40,000. *In re Galvan*, 110 B.R. 446 (Bankr. 9th Cir.1990); H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 360-61, *reprinted in* 1978 U.S.Code Cong. & Admin. News, 5787, 5963, 6316. The amount of equity a debtor has in his home is a question for the trier of fact, *see In re Galvan*, 110 B.R. 446, and that amount was not precisely determined in this case. We thus are unable to say from the record how much equity the Sanderfoots had in their home at the time of their divorce. However, the issue is immaterial to the resolution of this case. *See infra* section IIB.2.

[4] The Bankruptcy Code provides:

Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in prop-

filed her objection to the motion, claiming section 522(f)(1) could not operate to divest her of her interest in the marital home.[5] The United States Bankruptcy Court for the Eastern District of Wisconsin denied Mr. Sanderfoot's motion on March 9, 1988. The bankruptcy court applied the reasoning of *In re Boyd*, 741 F.2d 1112, 1114-15 (8th Cir. 1984), which held that a lien created by a divorce decree protects the non-debtor spouse's preexisting interest in the marital home and thus does not attach to the debtor's interest. In this case, the court determined that Mr. Sanderfoot acquired his interest in the property by virtue of the divorce decree and took that interest subject to Ms. Farrey's lien. *In re Sanderfoot*, 83 B.R. 564, 567-68 (Bankr.E.D.Wis.1988). Consequently, the court held that even though the lien impaired Mr. Sanderfoot's exemption, it could not be avoided because it did not attach to his interest in the home.

C. *The District Court*

In determining whether the requirements of section 522(f) had been satisfied, the district court concluded

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erty to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

(1) a judicial lien....

11 U.S.C. § 522(f).

Section 522(b)(1) allows an individual debtor to exempt from property of the estate the property listed in section 522(d)(1), which permits exemption of "[t]he debtor's aggregate interest, not to exceed $7,500 in value, in real property or personal property, that the debtor or a dependent of the debtor uses as a residence. . . ."

[5] Ms. Farrey also objected to Mr. Sanderfoot's valuation of assets in the bankruptcy proceeding and argued that he was bound by the divorce court's value determinations. The divorce court had valued the marital home at $104,000, but in his bankruptcy filings four months after entry of the divorce decree Mr. Sanderfoot listed its value at $82,750. *See In re Sanderfoot*, 83 B.R. 564, 565-66 (Bankr.E.D.Wis.1988). The bankruptcy court concluded that because Ms. Farrey's lien could not be avoided, it was "unnecessary for a finding of value to be made at this time." *Id.* at 565.

that there was "no dispute that the lien is a judicial lien that impairs Mr. Sanderfoot's homestead exemption."[6] *In re Sanderfoot*, 92 B.R. 802, 803 (E.D.Wis. 1988). The court rejected the reasoning of *Boyd* and held that the divorce decree both extinguished all preexisting interests and simultaneously created new interests. Accordingly, the bankruptcy court's order denying Mr. Sanderfoot's motion to avoid the lien under section 522(f)(1) was reversed. Ms. Farrey filed a timely notice of appeal on November 3, 1988.

II

ANALYSIS

A. *Standard of review*

The issue before the court is whether 11 U.S.C. § 522(f)(1) allows a bankruptcy debtor to avoid a lien against his homestead where the lien was granted to the debtor's former spouse under a divorce decee. There are no questions of fact. The issue is one of law, subject to *de novo* review. *See Park Terrace Townhouses v. Wilds*, 852 F.2d 1019, 1021 (7th Cir.1988); *In re Evanston Motor Co., Inc.*, 735 F.2d 1029, 1031 (7th Cir.1984).

B. *Lien avoidance under 11 U.S.C. § 522(f)*

The inquiry in this case is the proper interpretation of section 522(f)(1). Though the issue seems straightforward, courts have had "some difficulty in defining precisely the interest of an ex-spouse arising out of a property settlement made during a divorce proceeding." *In re Donahue*, 862 F.2d 259, 262 (10th Cir.1988). The issue is one of first impression in the Seventh Circuit, though this "difficulty" has led to a split among the courts of appeals that have examined the statute. *Compare In*

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[6] However, the district court neither determined the value of the residence nor the extent to which Ms. Farrey's lien impaired Mr. Sanderfoot's exemption.

re Borman, 886 F.2d 273 (10th Cir.1989) *and Boyd v. Robinson*, 741 F.2d 1112 (8th Cir.1984) *with In re Pederson*, 875 F.2d 781 (9th Cir.1989) *and Maus v. Maus*, 837 F.2d 935 (10th Cir.1988). The bankruptcy and district courts that have "wade[d] into waters muddied before [them]" are similarly divided. *In re Rittenhouse*, 103 B.R. 250, 252 (D.Kan.1989).

Interpretation of a statute must begin with the statute's plain language. *United States v. Ron Pair Enterprises, Inc.*, —— U.S. ——, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989); *United States v. Rosado*, 866 F.2d 967, 969 (7th Cir.), *cert. denied*, —— U.S. ——, 110 S.Ct. 117, 107 L.Ed.2d 79 (1989). In this case, the bankruptcy code defines most of the terms relevant to our analysis of the nature of Ms. Farrey's lien. A "lien" is a "charge against or interest in property to secure payment of a debt or performance of an obligation." 11 U.S.C. § 101(33). The parties do not contest the conclusion that Ms. Farrey has a lien as that term is defined. Rather, their disagreement arises from contrary interpretations of the application of section 522(f)(1), which allows the debtor to avoid liens if three requirements are met:

> (1) The lien is fixed on an interest of the debtor in property;
>
> (2) The lien impairs an exemption to which the debtor would otherwise be entitled; and
>
> (3) The lien is a judicial lien.

In re Sanderfoot, 92 B.R. at 803 (citing *In re Hart*, 50 B.R. 956, 960 (Bankr.D.Nev.1985)). We shall analyze each of these requirements.

1. Is the lien fixed on an interest of the debtor?

Ms. Farrey first claims that her lien does not attach to Mr. Sanderfoot's interest in his homestead. The bankruptcy court agreed with this position and found that Mr. Sanderfoot could not avoid the lien because it did not attach to his interest in the property. 83 B.R. at 568-70. The district court rejected that argument, as has the only other Wisconsin court that has examined this issue. *See In re Duncan*, 85 B.R. 80, 82 (W.D.Wis.1988) (discussed *infra*).

The Tenth Circuit noted in *Maus v. Maus*, 837 F.2d 935, 939 (10th Cir. 1988) that "[m]any courts have struggled to find theories under which a lien to enforce a property settlement survives bankruptcy." The "survival" theory that numerous courts have relied upon, including the bankruptcy court in this case, was first articulated in *Boyd v. Robinson*, 741 F.2d 1112 (8th Cir. 1984). In *Boyd*, the debtor commenced a bankruptcy action seeking to avoid her ex-husband's lien, acquired during the parties' divorce proceeding, on their former homestead. The Eighth Circuit held that liens granted by a divorce decree do not attach to an interest of the debtor, but rather protect a preexisting property right of the non-debtor spouse in the marital home arising under state law during the marriage. *Id.* at 1114-15. The court determined that applicable Minnesota law recognized the non-debtor spouse's property interest in a homestead acquired during the marriage with marital assets or assets contributed by that spouse. *Id.* at 1114. Since *Boyd*, several courts similarly have recognized the non-debtor spouse's preexisting rights in the marital home and refused to let the debtor avoid the lien.[7]

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[7] *See, e.g., In re Rittenhouse*, 103 B.R. 250 (D.Kan.1989) (divorce judgment did not terminate non-debtor spouse's interest, but created a lien to secure that interest; debtor spouse thus received interest in the homestead subject to the lien); *Zachary v. Zachary*, 99 B.R. 916, 919 (S.D.Ind.1989) (lien attaches at same time as title is transferred; debtor thus acquired properly interest subject to lien and lien did not attach to an interest of the debtor); *In re Hart*, 50 B.R. 956, 961 (Bankr.D.Nev.1985) (lien did not attach because it was created simultaneously with debtor's interest in the homestead

Other courts have declined to follow the Eighth Circuit's rationale. In *In re Pederson*, 875 F.2 781 (9th Cir. 1989), a split panel of the Ninth Circuit expressly repudiated *Boyd* and determined that a lien granted in a divorce proceeding to a non-debtor spouse against the debtor's property was subject to avoidance. The *Pederson* court rejected the Eighth Circuit's analysis that the debtor's lien attached to a preexisting interest in the property. In the Ninth Circuit's view, the state court awarded the homestead to the non-debtor spouse before imposing the lien. *Id.* at 783. The debtor spouse had an interest in the property prior to the order of dissolution, but

> "that is all it was—pre-existing. [The non-debtor's] prior interest in the house was dissolved. In its place, the court gave him a debt . . . enforceable by a lien on the house. What had been a property interest became simply collateral for a debt. Since the house was simultaneously vested solely in [the debtor spouse], the lien *must* have attached to her interest in the house, for no one else possessed any ownership interest in the house."

Id. (quoting *Boyd*, 741 F.2d at 1115 (Ross, J., dissenting) (emphasis in original)).

The Tenth Circuit also rejected the reasoning of *Boyd* in *Maus v. Maus*, 837 F.2d 935 (10th Cir.1988).[8] There, a settlement agreement incorporated in the divorce judgment awarded the debtor the marital home subject to a

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where property in effect was conveyed subject to a lien to secure payment of non-debtor spouse's settlement); *In re Seablom*, 45 B.R. 445, 451 (Bankr.D.N.D.1984) (lien created by divorce decree protected non-debtor spouse's preexisting property interest and did not attach to an interest of the debtor).

[8] *But see In re Borman*, 886 F.2d 273 (10th Cir.1989) and *In re Donahue*, 862 F.2d 259 (10th Cir.1988), discussed *infra* in subpart B, section 3, where the Tenth Circuit limited the holding of *Maus*.

lien[9] in favor of the non-debtor spouse. Because the state court awarded the debtor sole title to the home, "free and clear of any and all claims" of the non-debtor spouse, the lien[10] attached solely to the debtor's interest in the residence. *Id.* at 937, 939. The court further noted that the "convoluted theory" espoused in *Boyd* ignored the fact that "the decree gives one party title outright and that is the interest to which the lien attaches." *Id.* at 939.

Several bankruptcy and district courts have followed the rationale in *Pederson*,[11] but only one other case has focused on the avoidability of a lien created by a Wisconsin divorce court. In *In re Duncan*, 85 B.R. 80 (W.D. Wis.1988), the debtor and his wife lived on a farm owned by the debtor prior to their marriage. When the couple divorced, the debtor received the farm and the wife received a lien upon the farm to secure a cash settlement. As in the instant case, the lien was created in and by the divorce decree. *Id.* at 81. The court determined that the bankruptcy court's decision to uphold the lien directly conflicted with "the unambiguous language" of section 522 and therefore reversed. *Id.* at 82. The "plain intent"

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[9] The *Maus* court, while not explicitly deciding whether a lien technically had been created under Kansas law, held that any lien created was a judicial lien within the meaning of 11 U.S.C. § 101 (32). 837 F.2d at 938-39. Assuming that such a lien was created as a matter of state law, the court proceeded to determine whether it attached to the debtor's interest in the property within the meaning of section 522(f)(1).

[10] *See supra* note 9.

[11] *See, e.g., In re Boggess*, 105 B.R. 470, 474-75 (Bankr.S.D.Ill. 1989) (where debtor was awarded marital residence "free and clear of any interest of the [non-debtor spouse]," lien attached and was avoidable); *In re Conway*, 93 B.R. 731, 733 (Bankr.N.D.Okla.1988) (without analysis, the court concluded that the lien was fixed on the debtor's property); *In re Alvarado*, 92 B.R. 923, 926-27 (Bankr.D. Kan.1988) (court rejected the "preexisting interest" theory and held that lien attached to debtor's property).

of the divorce decree, which granted a lien upon the entire farm, was to declare the debtor the sole owner of the property, subject to his ex-wife's lien. Whether the non-debtor spouse had a preexisting interest in the farm was thus "simply irrelevant. It is plain that whatever interest she had was extinguished by the divorce decree. . . ." *Id.* The court thus rejected *Boyd* and relied on *Maus*, *Pederson*, and the dissent in *Boyd* to conclude that a lien created by a divorce decree to secure payment of a property settlement is avoidable. *Id.* at 82-83.

The facts in the case before us correspond to those in *Pederson*. Mr. Sanderfoot was awarded the marital home under the divorce decree subject to Ms. Farrey's lien. Whether she had prior rights in the residence under Wisconsin law is, in the words of the Western District of Wisconsin, "simply irrelevant." *In re Duncan*, 85 B.R. at 82. Any preexisting interest Ms. Farrey had in the homestead was dissolved in the divorce proceeding. Her new interest, created in the dissolution order and evidenced by her lien, attached to Mr. Sanderfoot's interest in the property. Like the Ninth Circuit, we therefore respectfully decline to follow *Boyd*. We conclude that *Pederson* and its progeny are better reasoned and faithful to the plain language of section 522(f).[12] Consequently, we conclude that Ms. Farrey's lien attached to Mr. Sanderfoot's interest in the homestead property.

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[12] Although mindful of our responsibility to review the issue *de novo*, "we accord great weight to the determination of the district court sitting in the state whose law is to be applied." *PPG Indus., Inc. v. Russell*, 887 F.2d 820, 823 (7th Cir.1989). To the extent Wisconsin family law is relevant to the interpretation of the divorce decree and lien, the Eastern and Western districts of Wisconsin, in this case and *In re Duncan*, respectively, have interpreted similar divorce decrees and determined that the liens created in each attached to and were "fixed on an interest of the debtor." *See* 11 U.S.C. § 522(f).

2. Does the lien impair an exemption to which debtor is entitled?

The parties do not dispute that the real estate at issue constitutes Mr. Sanderfoot's homestead under Wis.Stat. § 815.20 and that he thus was entitled to exempt the property from his bankruptcy estate. *See* Appellant's Br. at 6. The question is whether Ms. Farrey's lien impairs that exemption. Neither the parties nor the courts below focus on this aspect of the lien avoidance statute. With little discussion, the bankruptcy court determined that the lien impaired Mr. Sanderfoot's homestead exemption, 83 B.R. at 566-67, and the district court stated that the parties did not dispute the issue, 92 B.R. at 803. Indeed, Ms. Farrey did not address this point in either her brief or at oral argument. Accordingly, we conclude that any challenge has been waived and affirm the determination that the lien impairs the debtor's interest in his homestead property. We must leave it to the bankruptcy court to determine in the first instance the value of Mr. Sanderfoot's homestead, and thus the exemption amount to which he is entitled.[13]

3. Is the lien a judicial lien?

Under the Bankruptcy Code, a judicial lien is defined as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." 11 U.S.C. § 101(32). Applying the plain language of the statute, there can be no doubt that Ms. Farrey's lien, granted by the Wisconsin Circuit Court for Outagamie County, was obtained by "legal proceedings." The bankrupcty court,

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[13] The divorce court valued the homestead at $104 000. Ms. Farrey objected to Mr. Sanderfoot's valuation of $82,750 in his Chapter 7 petition. Neither the bankruptcy nor district court settled this issue. However, they are not bound by the valuations determined in the divorce proceedings. *See In re Boggess*, 105 B.R. 470, 474 (Bankr. S.D.Ill.1989); *In re Sanderfoot*, 83 B.R. 564, 570-71 (Bankr.E.D. Wis.1988); 3 *Collier on Bankruptcy* § 521.08[2] (15th ed. 1989).

although concluding that Ms. Farrey's lien could not be avoided, yet conceded that the lien "is without question a type of judicial lien." 83 B.R. at 566. The district court similarly determined that "the lien is a judicial lien that impairs Mr. Sanderfoot's homestead exemption." 92 B.R. at 803. Ms. Farrey nonetheless maintains that the lien imposed by the divorce court is not a judicial lien. Therefore, we turn to an examination of her argument.

The same year the Tenth Circuit handed down *Maus v. Maus*, 837 F.2d 935 (10th Cir.1988), that court decided *In re Donahue*, 862 F.2d 259 (10th Cir.1988). The dispute in the *Donahue* case centered around the terms of a divorce decree pursuant to which the debtor received the marital residence "subject to" a money judgment awarded to the non-debtor spouse. 862 F.2d at 260. The *Donahue* panel determined that the decree created an equitable lien. *Id.* at 262-63. The court distinguished *Maus:*

> The critical difference between this case and *Maus* is that the terms of the divorce decree in *Maus* explicitly awarded the property to the debtor spouse "free and clear" of any claims of the nondebtor sponse. In our case, by contrast, the divorce decree itself clearly contemplated the creation of a lien or security interest of some kind in favor of [the non-debtor spouse] and against the Property.

Id. at 265.

The Tenth Circuit subsequently relied on *In re Donahue* to limit the holding of *Maus* and declare that a lien in favor of the debtor's former spouse against the debtor's homestead could not be avoided. *In re Borman*, 886 F.2d 273 (10th Cir.1989). The panel explicitly stated that *Maus* was "limited to the issue of whether a money judgment awarded in a divorce decree can give rise to a lien on homestead property when the divorce decree itself does not specifically create a lien." *Id.* at 274. Because the debtor in *Borman* would have been unjustly enriched if allowed to avoid a lien created by the dissolution order,

the court imposed an equitable lien and refused to permit its avoidance. *Id.*

While other courts have echoed a similar rationale,[14] such reasoning is clearly incompatible with the reasoning of *In re Pederson* that rejected as "implausible and unsupported by the language of the Code" theories advanced by bankruptcy courts for "salvaging liens enforcing property settlements." 875 F.2d at 783 n. 4.[15] Finally, the

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[14] In *In re Davis*, 96 B.R. 1021, 1022 (M.D.Fla.1989), for example, the court concluded that the final judgment entered by the divorce court recognized an already existing equitable lien. *See also Zachary v. Zachary*, 99 B.R. 916, 920 (S.D.Ind.1989) (lien was not one "obtained by judgment" because lien merely recognized preexisting property right in homestead); *In re Warren*, 91 B.R. 930, 931 (Bankr.D.Or.1988) (lien which simply recognizes preexisting interest in marital property is not judicial lien). Similarly, in *In re Worth*, 100 B.R. 834, 840 (Bankr.N.D.Tex.1989), the court examined Texas law and concluded that a lien imposed by the divorce court was an unavoidable vendor's lien. *See also In re Boyd*, 93 B.R. 538, 539-40 (Bankr.S.D.Tex.1988) (non-debtor spouse held valid implied vendor's lien against the homestead where divorce decree awarded home to debtor subject to second lien in facor of non-debtor spouse; § 522 (f) question not reached because debtor did not seek to avoid lien); *In re Hart*, 50 B.R. 956, 960-61 (Bankr.D.Nev.1985) (non-debtor spouse had unavoidable equitable lien securing his equity in debtor's property); *In re Thomas*, 32 B.R. 11, 12 (Bankr.D.Or.1983) (lien imposed by dissolution decree intending to effect a division of property is not avoidable judicial lien). An analogous theory is that the divorce court created a security interest or mortgage rather than an avoidable judicial lien. *See In re McCormmach*, 111 B.R. 330 (Bankr.D.Or.1990) (consensual mortgage or homestead incorporated into divorce decree was not a judicial lien); *In re Conway*, 93 B.R. 731, 733-34 (Bankr.N.D.Okla.1988) (lien conferred in divorce judgment "is more in the nature of a security interest or a mortgage and thus is not a mere judicial lien"); *Wozniak v. Wozniak*, 121 Wis.2d 330, 359 N.W.2d 147 (Wis.1984) (proceeding under state law rather than the bankruptcy code, court concluded that divorce judge clearly intended to create security interest).

[15] *In re Godfrey*, 102 B.R. 769, 773 (Bankr. 9th Cir.1989), relying on *In re Pederson*, concluded that a lien on real property arising from marriage dissolution is an avoidable judicial lien under § 522(f)(1).

dissent in *Boyd* concluded that the state court gave the nondebtor spouse a judicial lien, as opposed to an equitable mortgage or security interest, in the debtor's residence.[16] 741 F.2d 1112, 1115 and n. 1 (8th Cir.1984) (Ross, J., dissenting). Judge Ross noted that the lien granted by the divorce court fit "precisely" within the definition in section 101(32); the lien was obtained by judgment because the non-debtor spouse had no interest or lien on the house until the divorce court's order. *Id.* at 1115-16. Moreover, the lien was not created by an agreement, so did not constitute a security interest. Nor was it created by contract or conveyance. It was imposed by the court, so could not be termed a mortgage. *Id.* at 1116.[17]

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[16] The majority did not consider whether the non-debtor spouse had a judicial lien.

[17] Following the dissent in *Boyd*, the Western District of Wisconsin also found "unpersuasive" the argument that the divorce court awarded the non-debtor spouse an equitable mortgage or other non-judicial lien. *In re Duncan*, 85 B.R. 80, 82-83 (W.D.Wis.1988). Because the lien in *Duncan* was created in a disputed divorce proceeding, and not by agreement, it could not be a security interest as that term is defined by 11 U.S.C. § 101(45). *Id.* at 83. Moreover, "[t]he fact that the Wisconsin state court [in *Wozniak v. Woznaik*, 121 Wis.2d 330, 359 N.W.2d 147, 150 (Wis.1984)] has held that such a lien is to be foreclosed under the mortgage statutes is irrelevant," given the resulting chaos should state courts be permitted to alter what would clearly be a judicial lien by terming it an '"equitable mortgage.'" *Id.* (quoting *In re Boyd*, 741 F.2d at 1115 (Ross, J., dissenting)).

Bankruptcy courts have repeated this reasoning in their decisions. Under the clear language of the Code, the court in *In re Boggess*, 105 B.R. 470, 474-75 (Bankr.S.D.Ill.1989), held that the lien arising from the divorce proceeding fit the statutory definition of "judicial lien." The court in *In re Brothers*, 100 B.R. 565, 567-68 (Bankr. N.D.Ala.1989), a case factually comparable to the one before us, also concluded that the non-debtor spouse possessed an avoidable judicial lien as defined by the unambiguous terms of the Code. *See also In re Alvarado*, 92 B.R. 923, 925 (Bankr.D.Kan.1988) (lien created by divorce decree is judicial lien, not "consensual" lien). In

We conclude that, whether liens of the type at issue in this case are called equitable liens or vendor's liens or security interests, they still are "judicial liens" within the definition of section 101(32) and, consequently, are within the embrace of section 522(f)(1). The federal definition of "judicial lien," 11 U.S.C. 101(32), is unambiguous and must control in this instance. *See McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369-70, 65 S.Ct. 405, 407-08, 89 L.Ed. 305 (1945). Like the court in *In re Boggess*, we find the rationale employed in *Boyd* and its progeny "strained and instead adopt the position of the *Pederson* line of cases that the Code provisions must be given their plain meaning despite the seemingly inequitable results in a divorce setting." 105 B.R. 470, 474 (Bankr.S.D.Ill.1989). "Regardless of its own perceptions of fairness, [this] Court must give effect to the policy decisions embodied in the express language of Code provisions," *id.* at 475, for as Judge Ross concluded in his dissent, "[i]f state law were allowed to vary what would otherwise be a judicial lien by merely calling the interest an 'equitable mortgage,' havoc would result." *In re Boyd*, 741 F.2d at 1115. In this case, the lien imposed by the Outagamie County circuit court is a judicial lien as defined in the Code. It was created by a judgment and it is a "charge against" the property awarded to Mr. Sanderfoot and is designed to secure payment of the $29,000 debt owed to Ms. Farrey. We thus conclude that the definition of § 101(32) is satisfied and the lien is in fact a judicial lien.

Conclusion

There are unquestionably a number of opposing interests involved in cases like this one. The court in *In re*

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yet another case analogous to the one before us, a Florida bankruptcy court declared that "[t]here is no question that an equitable lien is 'a judicial lien' and, therefore, within the scope of § 522(f)(1)." *In re Dudley*, 68 B.R. 426, 427 (Bankr.S.D.Fla.1986).

Worth, 100 B.R. 834, 837 (Bankr.N.D.Tex.1989), noted that it is not uncommon for divorce courts to award exempt property to Spouse A and create a lien on the property in favor of Spouse B. However,

> [i]f Spouse A subsequently files for bankruptcy and seeks to avoid the lien, bankruptcy courts are presented with substantial legal and policy conflicts. On one side stands the Congressional mandate that debts for property division are dischargeable in bankruptcy, and judicial liens on exempt property are avoidable pursuant to § 522(f)(1). Ranged on the opposite side are the federal judiciary's respect for the judgments of state courts, the feeling that a debtor (although deserving a fresh start) should not profit from a bankruptcy proceeding, and the concern that Spouse B's future earning ability may not be as great as that of Spouse A.

Id. (footnote omitted). The court concluded that "[w]hen faced with these disparate issues, it is not surprising that courts have reached different conclusions." *Id.*

We recognize the policy arguments against avoidance, but emphasize that it is not for the courts to make policy: "permitting avoidance of this lien" may be "a harsh result," but "[t]his type of decision is for Congress. Once Congress has decided, its judgment should be respected." *In re Boyd*, 741 F.2d 1112, 1116 (8th Cir.1984) (Ross, J., dissenting). Ms. Farrey urges this court to render a convoluted reading of section 522(f)(1), given the claimed inequitable result if the statute is read literally. While we might have struck a different balance than did Congress, we are not free to disregard the clear legislative judgment that debtors may avoid judicial liens of the type at issue. Perhaps Congress should reexamine the statute, but until it is amended, this court is constrained to apply the law as plainly written. We therefore decline

to follow one of the various routes taken in an effort to prevent "injustice" suggested by *Boyd* and its progeny because we agree that "the policy considerations at issue have been weighed by Congress and embodied in the language of the Bankruptcy Act. It is the prerogative of Congress and not of the courts to adjust that balance." *Maus v. Maus*, 837 F.2d 935, 940 (10th Cir.1988). Because it is clear from the face of the statute that Ms. Farrey has a judicial lien that impairs Mr. Sanderfoot's homestead exemption, we conclude that the lien is avoidable under section 522(f)(1).

Ms. Farrey's lien is fixed on Mr. Sanderfoot's interest in his home, impairs an otherwise proper homestead exemption, and was obtained through the judicial process. All the elements of section 522(f)(1) are satisfied, and we therefore affirm the district court's determination that the lien is avoidable.

AFFIRMED.

POSNER, Circuit Judge, dissenting.

The fact that a judicial decision offends the moral sense of laymen does not prove the decision wrong. Institutional or systemic considerations, themselves morally significant, but invisible to the laity, may outweigh the tug of simple justice. But they do not do so here.

The divorce court found that the net value of the Sanderfoots' marital property, consisting primarily of the couple's home, was $58,000 and that the property should be split 50-50. No one questions that this is the proper division. To effect the split, the court awarded to the husband the couple's home, which had been bought during the marriage and was jointly owned, and ordered him to pay $29,000 in cash to the wife. To enforce this order, the court gave her a lien on the house. The husband did not pay his wife a cent (nor did he comply with any other order of the divorce court, including an order to

provide child support), but instead declared bankruptcy, claimed a homestead exemption for the house, and filed a motion under 11 U.S.C. § 522(f) to avoid the wife's lien—a tactic designed to nullify (or perhaps to complete the nullification of) the divorce decree and give the husband all rather than half the marital property. Today we place the crown of success on this vicious scheme. The Bankruptcy Code as liberalized in 1978 is widely criticized as making bankruptcy an ordinary tool of business planning, but after today it will also be criticized as a tool by which bounders defraud their spouses.

This result, a perversion of bankruptcy law, is a product neither of judicial hardheartedness nor of legislative ineptitude, but of judicial misunderstanding of the lien-avoidance provision of the Bankruptcy Code. Section 522(f)(1) allows the debtor (i.e., the bankrupt) to avoid a judicial lien that impairs an exemption. The purpose—as appears unmistakably from legislative history the purport and significance of which are unquestioned—is to thwart unsecured creditors who, sensing impending bankruptcy, rush into court to obtain liens on exempt property, thus frustrating the purpose of the exemptions. As explained in H.R.Rep. No. 595, 95th Cong., 1st Sess. 126 (1977), the lien-avoidance provision "allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists to provide relief for an over-burdened debtor. If a creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions." That is not what happened here. No creditor beat the debtor into court. The lien was created by a court, it is true, but not to enable a creditor to defeat his debtor's household exemption; it was done to protect a spouse's preexisting property rights.

Of course often the language of a statute carries beyond the statutory purpose, and when that happens subtle issues of interpretation arise. This may seem to

be such a case, because the lien was created by a court and was therefore a "judicial lien." But the statute does not say that the bankrupt may avoid a judicial lien to the extent that it impairs an exemption; it says that the bankrupt may avoid "the fixing of" such a lien "on an interest of the debtor in property." The debtor must have the interest at the time the court places the lien on it. That condition is not satisfied here. Before the divorce, the Sanderfoots owned their home jointly. Wis. Stat. §§ 766.31, 767.255; *Krueger v. Wisconsin Department of Revenue*, 124 Wis.2d 453, 460, 369 N.W.2d 691, 694-95 (1985). Mr. Sanderfoot did not own it. Certainly he did not own it free and clear of his wife's interest, which was equal to his own. He could not have sold it without her consent, whether or not her name appeared on the title papers. Wis.Stat. § 706.09(1)(e). The divorce court did not extinguish her interest, but instead transformed it from that of a co-owner to that of a mortgagee. *Wozniak v. Wozniak*, 121 Wis.2d 330, 359 N.W.2d 147 (1984).

It is settled in the nonfamily context that a debtor cannot avoid a lien on an interest acquired after the lien attached. *In re McCormick*, 18 B.R. 911 (Bankr.W.D.Pa. 1982); *In re Stephens*, 15 B.R. 485 (Bankr.W.D.N.C. 1981). The principle should be the same if the interest and lien arise from the same transaction, here a divorce decree that gave the entire property to Sanderfoot subject to a lien in favor of his wife. It cannot be argued that enforcing the lien would diminish the amount available to creditors who extended credit to the debtor before the lien attached, or to the debtor himself claiming an exemption. Before the wife acquired her lien, Sanderfoot had only an undivided one-half interest in the property. Enforcing the wife's lien cannot cut down on the size of the bankrupt estate as it existed before the lien attached.

I am at a loss to understand why we should strain the language and ignore the purpose of the lien-avoidance

statute in order to achieve a result that does not promote, but instead denies, simple justice—layman's justice. I do not expect an argument about this characterization of our result, because at oral argument the husband's lawyer admitted that his client's action had subverted the purpose of the divorce decree. The lawyer added, however, that this did not matter because (in his words) "bankruptcy is inequitable." I had thought bankruptcy a branch rather than a rejection of equity. In so saying I do not endorse a free-wheeling judicial discretion to disregard either the Bankruptcy Code or the state-law entitlements that the Code is largely concerned with enforcing. "[E]quity may supplement, but may never supersede, the [Bankruptcy] Act." *Marin v. England*, 385 U.S. 99, 110, 87 S.Ct. 274, 280, 17 L.Ed.2d 197 (1966) (Harlan, J., dissenting). See also *Boston & Maine Corp. v. Chicago Pacific Corp.*, 785 F.2d 562, 566 (7th Cir. 1986); *Levit v. Ingersoll Rand Financial Corp.*, 874 F.2d 1186, 1197-98. But when a debtor uses the Code to steal from his former wife we should not lightly conclude that the Code, properly read, commands such a result.

I acknowledged at the outset of this opinion, and I repeat, that superficially unjust results are sometimes made just by institutional and systemic concerns, such as the desirability of simple rules. If this were not so, there would never be a tension between legal justice and substantive justice. But there is no such tension *here*. Mrs. Sanderfoot is not asking us to disregard the purpose of Congress, but to fulfill it by adhering to the precise contours of the lien-avoidance section. She is asking us not to disregard Congress's words, but to apply them. She is asking not for a complex rule or vague standard but for a straightforward distinction between a judicial lien on the bankrupt's property and a judicial lien intended to secure a spouse's preexisting interest in marital property. We could do justice here without deforming the Bankruptcy Code.

Precedent does not compel the court's result. Far from it. The position I urge here was adopted by the Eighth Circuit in *Boyd v. Robinson*, 741 F.2d 1112 (8th Cir. 1984), as it has been by most bankruptcy judges. *In re Thomas*, 32 B.R. 11 (Bankr.D.Ore.1983); *In re Williams*, 38 B.R. 224 (Bankr.N.D.Okla.1984); *In re Scott*, 12 B.R. 613 (Bankr.W.D.Okla.1981). The Tenth Circuit rejected it in *Maus v. Maus*, 837 F.2d 935 (10th Cir.1988). But *In re Donahue*, 862 F.2d 259 (10th Cir.1988), decided a few months later, and *In re Borman*, 886 F.2d 273 (10th Cir.1989), repudiated *Maus* in the guise of distinguishing it. In *In re Pederson*, 875 F.2d 781 (9th Cir. 1989), the Ninth Circuit lined up with *Maus*. It reasoned (as had the dissenting judge in *Boyd*) that when the divorce court awarded the home to one spouse, it dissolved the other spouse's interest and created in that spouse a new interest, a judicial lien the fixing of which the bankrupt was entitled to avoid to the extent it impaired an exemption. I do not doubt that the decree can be so characterized, but I disagree that the characterization supports a conclusion that the spouse's lien is avoidable. The lien in our case was created in the same document—the divorce decree—that gave the husband his interest in the property. The lien qualified that interest from the start. There was no instant at which Sanderfoot owned the property free and clear of the wife's interest. He seeks a fresh start with someone else's property.

We should go with the Eighth and Tenth Circuits. We should reverse.

UNITED STATES DISTRICT COURT
E.D. WISCONSIN

No. 88-C-373

Bankruptcy No. 87-02046

IN RE GERALD J. SANDERFOOT,
Debtor-Appellant.

Oct. 4, 1988

Harvey G. Sampson, Appleton, Wis., for plaintiff.

Charles J. Hertel, Dempsey, Magnusen, Williamson & Lampe, Neenah, Wis., for defendant.

DECISION AND ORDER

MYRON L. GORDON, Senior District Judge.

Gerald Sanderfoot, a debtor in bankruptcy, sought to avoid a lien pursuant to 11 U.S.C. § 522(f). The bankruptcy court held that the lien was not avoidable, 83 B.R. 564; Mr. Sanderfoot appeals. The order of the bankruptcy court will be reversed.

The only issue before this court is an issue of law and, therefore, subject to de novo review by this court on appeal. *In Re Duncan*, 85 B.R. 80, 82 (W.D.Wis.1988), citing, *In Re Evanston Motor Co. Inc.*, 735 F.2d 1029, 1031 (7th Cir.1984). The issue on review is whether a debtor may, pursuant to 11 U.S.C. § 522(f), avoid a lien on his homestead arising from the contested property division in a divorce proceeding.

A lien may be avoided under 11 U.S.C. § 522(f)(1) if three requirements are met:

> (1) The lien is fixed on an interest of the debtor in property;
>
> (2) The lien impairs an exemption to which the debtor would otherwise be entitled; and
>
> (3) The lien is a judicial lien.

In Re Hart, 50 B.R. 956, 960 (Bkrtcy.D.Nev.1985).

In the case at bar, there is no dispute that the lien is a judicial lien that impairs Mr. Sanderfoot's homestead exemption. Objection has been made to Judge McGarity's decision that the lien is not fixed upon a property interest of Mr. Sanderfoot. In arriving at that conclusion, Judge McGarity fully analyzed the Wisconsin law on the impact of divorce with regard to liens on real estate. Thereupon, the bankruptcy court followed the reasoning outlined in *Boyd v. Robinson*, 741 F.2d 1112 (8th Cir. 1984), which represents one branch of thought on this type of lien avoidance. However, other courts of appeals have rejected *Boyd*. *Maus v. Maus*, 837 F.2d 935 (10th Cir. 1988), *see also Pederson v. Stedman*, 78 B.R. 264 (9th Cir. BAP 1987). The issue in this case has not been addressed by the court of appeals for the seventh circuit. However, the district court for the western district of Wisconsin did confront the identical issue and rejected the reasoning of *Boyd*. *In Re Duncan*, 85 B.R. 80 (W.D. Wis.1988).

Like Judge Shabaz, I discredit the reasoning in *Boyd*. The theory announced in *Boyd* and followed by Judge McGarity is that the lien does not attach to the property of the debtor, but rather, it attaches to the pre-existing interest of the non-debtor spouse; therefore, the debtor takes the property subject to an unavoidable lien. "The problem with this convoluted theory is that, as the dissent in *Boyd* points out, 741 F.2d at 1112, the decree gives one party title outright and that is the interest to which

the lien attaches." *Maus v. Maus*, 837 F.2d 935, 939 (10th Cir.1988).

I am unable to adopt the theory that the debtor acquired the property subject to a lien. Whatever preexisting interests the parties had were extinguished by the divorce decree. New interests were simultaneously created: title in the homestead was given to Mr. Sanderfoot, and Mrs. Sanderfoot acquired a lien on that property. Now that Mr. Sanderfoot is in bankruptcy, the Bankruptcy Code provides that he may avoid Mrs. Sanderfoot's lien pursuant to § 522(f)(1) because he has met all of the statutory requirements of that section.

Therefore IT IS ORDERED that the order denying the debtor's motion under § 522(f)(1) be and hereby is reversed.

UNITED STATES BANKRUPTCY COURT
E.D. WISCONSIN

Bankruptcy No. 87-02046

IN RE GERALD J. SANDERFOOT, GERALD SANDERFOOT, GERALD SANDERFOOT, f/d/b/a IMPROVEMENTS UNLIMITED and d/b/a RAGUN'S BAR,
Debtor(s).

March 9, 1988

Harvey G. Samson, Bollenbeck, Block, Seymour, Rowland & Samson, S.C., Appleton, Wis., for petitioner.

Charles J. Hertel, Dempsey, Magnusen, Williamson & Lampe, Oshkosh, Wis., for respondent.

DECISION

M. DEE McGARITY, Bankruptcy Judge.

This case comes before the court on an objection to the debtor's motion for lien avoidance under 11 U.S.C. § 522(f)(1). A decree of divorce entered by a Wisconsin state court granted the debtor's ex-spouse a lien on the debtor's residence to secure payment to the ex-spouse of her portion of the property division. The debtor is seeking to avoid this lien under § 522(f)(1) as impairing his homestead exemption. For the reasons set forth below, the debtor's motion for lien avoidance under § 522(f)(1) will be denied.

The debtor's former spouse has also objected to the debtor's valuation of assets in this bankruptcy and argues

that the debtor is bound by the determinations of value in their divorce. The court now determines that it is not bound by those values, but in view of its ruling on the debtor's motion, it is unnecessary for a finding of value to be made at this time.

FACTS

Gerald J. Sanderfoot, the debtor, and Jeanne Farrey Sanderfoot were divorced on February 5, 1987. There was no agreement of the parties as to any provision of the division of property, maintenance or child support, and a trial was held on all issues. In the decree of divorce the state court found the couple owned property including approximately 27 acres of land with the couple's residence on it valued at $104,000. In addition, there was a business, Ragun's Bar, two cars, a tractor, trailer and numerous items of personal property.

Certain personal property was ordered turned over to the debtor's ex-spouse or sold at auction. The debtor was awarded title to all of the parties' remaining property, including house, land, both cars and the business together with responsibility for its attendant liabilities. In return for her interest in that property, the wife was awarded $29,208.44 in cash, amounting to approximately one-half of the net estate, payable in two equal installments on January 10, 1987, and April 10, 1987. To secure this payment, the court ordered that a lien in her favor be placed on the marital residence. In addition, the decree provided that the debtor pay child support, maintenance to his ex-spouse and attorney fees.

The record in this court shows that up until the time Mrs. Sanderfoot applied for a relief from stay, the debtor had not complied with a single order of the state court. He had not conducted the auction, delivered the personal property to his ex-wife, or made a single payment toward child support, maintenance or attorney fees. He had not made the cash payments that were ordered by the court

to be made to his ex-wife as compensation for her interest in the property.

Four months after entry of the decree of divorce, the debtor filed a Chapter 7 bankruptcy. Claiming that it impaired his homestead exemption in the property, he then moved pursuant to 11 U.S.C. § 522(f)(1) to avoid the lien given to his wife on the marital residence.[1] He listed the value of the residence at $82,750 in contrast to the $104,000 which was found by the state court to be the value of that property. The parties later stipulated to an independent appraisal of the property. It was appraised at $95,000, but there was no agreement to accept the appraiser's valuation.

The parties agree that the following are the only issues in contention: Whether the debtor may, pursuant to 11 U.S.C. § 522(f)(1), avoid a lien arising from the contested property division in his divorce proceeding, and whether the debtor is bound by the findings of the divorce court regarding the valuation of assets.

DECISION

The debtor argues that because property division payments are dischargeable under 11 U.S.C. § 523, he should be able to avoid the lien on his homestead. Such payments are indeed dischargeable, but this serves only to relieve the debtor of personal liability. The lien on the residence securing these payments will nevertheless remain in force unless it can be avoided under § 522(f)(1) or another Code provision. *In re Williams*, 38 B.R. 224, 226-27

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[1] (f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

(1) a judicial lien; . . .

11 U.S.C. § 522(f)(1)

(Bkrtcy.N.D.Okl.1984). The court first addresses that issue.

Lien Avoidance

Before any lien may be avoided under § 522(f)(1), the debtor must prove three elements:

1. The lien is fixed on an interest of the debtor in property;
2. The lien impairs an exemption to which the debtor would otherwise be entitled; and
3. The lien is a judicial lien.

In re Hart, 50 B.R. 956, 960 (Bkrtcy.D.Nev.1985); *In re Thomas*, 32 B.R. 11, 12 (Bkrtcy.D.C. 1983).

The lien this debtor seeks to avoid is not of the type that Congress intended to address by § 522(f)(1).

> Congress intended by § 522(f)(1) to allow the removal of judicial liens obtained by creditors on a debtor's exempt property. ". . . the bill gives the debtor certain rights not available under current law with respect to exempt property. The debtor may avoid any judicial lien on exempt property . . . (This, right allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists to provide relief for an overburdened debtor. If the creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions . . ." House Report 95-595, 95th Cong., 1st Sess., 1977, p. 126, U.S.Code Cong. & Admin.News, 1978, pp. 5787, 6087.

In re Thomas, *supra*, at 12.

This legislative history makes clear that the policy behind 11 U.S.C. § 522(f)(1) was not to circumvent a divorce court's decision by allowing one spouse to acquire substantially all of the predivorce assets to the exclusion of the other. Mr. Sanderfoot is attempting to manipulate bankruptcy law for this very purpose, and to permit such a result would be inequitable and contrary to public policy. However, in addition to policy grounds, there are legal grounds for denying avoidance of the lien.

Mrs. Sanderfoot's lien is without question a type of judicial lien. 11 U.S.C. § 101(32). *But see Wozniak v. Wozniak*, 121 Wis.2d 330, 359 N.W.2d 147 (1984), which characterized such a lien as a mortgage. Furthermore, even if the $104,000 value found by the divorce court is used, as she has argued, and the amount of the first and second mortgages ($37,490 and $9,935, respectively) is deducted, the lien impairs the debtor's homestead exemption.

Section 522(f) permits avoidance of the "*fixing* of a lien on an *interest* of the debtor." The statute uses the word "fixing" instead of "fixed;" "interest" instead of "property." The implication of the House Report and this language in § 522(f) is that Congress intended the avoidance of liens that became fixed after the debtor's acquisition of the interest in property, not before. *In re Williams*, 38 B.R. 224, 226-27 (Bkrtcy.N.D.Okl.1984); *Thomas*, *supra*, at 12. More explicitly, § 522(f) provides that "a judicial lien which attached to an interest in property prior to the debtor's acquisition of that interest is not avoidable" pursuant to § 522(f) inasmuch as "the phrase 'an interest of the debtor in property' refers to an unencumbered interest at the time of acquisition." *Williams*, *supra*, at 228, quoting from *In re McCormick*, 18 B.R. 911 (Bkrtcy.W.D.Pa.1982).

As stated in *Williams*:

> [i]t is clear that a lien imposed by a divorce decree does not even remotely resemble the scenario presented here, [where creditors rush to turn their unsecured claims into judicial liens before the debtor can file bankruptcy] which presupposes the existence of a property interest in the debtor *before* the attach-

ment of a judicial lien to that interest. (emphasis original)

Id. at 227-28.

In a divorce proceeding, the document which conveys one spouse's interest in the homestead to the other spouse simultaneously creates a lien in favor of the spouse who will no longer be allowed to live in the residence. In effect, the property is conveyed to the debtor subject to a lien to secure payment of the nonresident spouse's share of the property settlement. *Thomas, supra.* As such, the debtor's property interest is an "interest of the debtor in property" which was not owned by him before it was conveyed to him with the judicial lien attached. A lien of this kind, whether or not the creditor is an ex-spouse, may not be avoided. *McCormick, supra.* (Debtor acquired her interest in property after the creditor's lien attached. Since she received it subject to the lien, it was unavoidable under § 522(f).)

This issue has not yet been decided at the appellate level in the 7th Circuit. The Court of Appeals of the 8th and 10th Circuits and the Bankruptcy Appellate Panel of the 9th Circuit have considered it but reached inconsistent results. In *Boyd v. Robinson*, 741 F.2d 1112 (8th Cir.1984), the bankruptcy court found that a lien imposed by a divorce decree could be avoided as a judicial lien if the lien was the result of a contest as opposed to an agreement between the parties. The district court reversed, and the 8th Circuit Court of Appeals affirmed the district court. The Court of Appeals held that the lien in question protected the debtor's ex-spouse's "pre-existing" property right in the marital residence arising under state law during the marriage. *Id.* at 1115.

In *Boyd v. Robinson*, the wife had owned the homestead prior to marriage and had continued to hold the property in her own name following marriage. The court analyzed Minnesota law to determine whether the nondebtor husband had acquired an interest in the homestead prior to the divorce. Minnesota law restricts conveyance of a homestead without a spouse's consent and provides for an inchoate right upon the death of the owner spouse during marriage. The court noted that the nondebtor had contributed to the mortgage and improvements on the house and that the value of the equity in the house was divided equally in the divorce according to Minnesota's statute providing for equitable division of property at divorce. In addition, Minnesota's definition of a "mortgage" includes the interest created by a divorce decree. In view of the foregoing, the court concluded that the lien attached to the nondebtor's property at the time it was conveyed to him by the divorce decree, and that it did not attach to the debtor's interest. Consequently, the lien was not avoidable under 11 U.S.C. § 522(f). *Id.* at 1114-15.

In the case at bar, it is not clear from the record whether the parties owned the homestead as joint tenants or tenants in common before the divorce, or whether it was always in Mr. Sanderfoot's name only. If Mrs. Sanderfoot was a co-owner and the divorce judgment conveyed her interest to the debtor, Mr. Sanderfoot took the property subject to her lien. In that event, the lien did not attach to the interest of the debtor, and it is not avoidable under 11 U.S.C. § 522(f)(1).

However, whether or not Mrs. Sanderfoot held title prior to the divorce is not determinative of this case. Applying the reasoning of *Boyd v. Robinson*, Mrs. Sanderfoot had an interest in the homestead even if it was in Mr. Sanderfoot's name at all times prior to the divorce. Wisconsin law as well as Minnesota law provides for an equitable property division at divorce. Wis.Stat. § 767.255. With the exception of property acquired by gift or inheritance (which is only divided upon a finding of hardship), all property owned by either spouse at the time of divorce is presumed to be divided equally, al-

though the court may deviate from an equal division based on equitable considerations set forth in the statute. *Id.* In this case the divorce court found no reason to alter these presumptions, and it divided the Sanderfoots' net estate equally.

The Wisconsin Supreme Court has analyzed Wisconsin's divorce law as creating a "species of common ownership" tantamount to an interest in property arising during the marriage, regardless of how property is titled or owned. *Krueger v. Wisconsin Department of Revenue*, 124 Wis.2d 453, 460, 369 N.W.2d 691, 694 (1985). Like Minnesota, Wisconsin requires a nontitled spouse's consent to convey a homestead (Wis.Stat. § 706.09(1)(e)) and preserves a surviving spouse's rights in property at the death of the other spouse. *See* Wis.Stat. §§ 851.55 (3m), 861.02, .03. Unlike Minnesota, Wisconsin does not have a statute defining this type of lien as a mortgage, but state case law accomplishes the same result. Where one party in a divorce action is granted an interest in specific real property subject to a lien of the other party in the same property to secure payment of a sum of money, under Wisconsin law, that lien is a mortgage. *Wozniak v. Wozniak, supra.*

The court in *Wozniak* distinguished a lien granted by the divorce court on specific property from a judgment lien which, under Wis.Stat. § 806.15, creates a general lien on all real estate of the debtor. The court concluded that the divorce court had created a mortgage lien and not a judicial lien. *Id.*, 121 Wis.2d at 336, 359 N.W.2d 147.

Finally, Wisconsin's enactment of the Marital Property Act, effective January 1, 1986, gave spouses an equal ownership interest in property earned or acquired during the marriage and after the determination date (the date from which the Act applies to a married couple, Wis. Stat. § 766.01(5)). Wis.Stat. § 766.31. Since the parties

remained married for over a year after the Act became effective, it is likely that improvements or mortgage payments during the year were made with marital property and that Mrs. Sanderfoot thereby acquired an ownership interest. Wis.Stat. § 766.63.[2]

Taken together, these considerations warrant application of the *Boyd v. Robinson* analysis to Wisconsin law, and they support a similar result in this case. In this case, regardless of how title was previously held, the debtor acquired his interest by virtue of the divorce judgment and subject to the lien. The lien did not attach to the debtor's interest, and it is accordingly not avoidable.

In an almost identical fact situation to that in *Boyd v. Robinson*, the Court of Appeals for the Ninth Circuit held that the lien *did* attach to an interest of the debtor in property. *In re Pederson*, 78 B.R. 264 (9th Cir. BAP 1987). The court said that the divorce decree extinguished the nondebtor's interest. The debtor was therefore the only legal owner of the property in question, and the non-debtor's lien attached to that property. Because the divorce decree expressly imposed a lien on the real property awarded to the debtor, the court held that the lien was a judicial lien under 11 U.S.C. § 101(32), and that it could be avoided under 11 U.S.C. § 522(f). The court thought this result harmonized different Code provisions in that because the debt is dischargeable under 11 U.S.C. § 523, the lien supporting that debt should likewise be avoidable under 11 U.S.C. § 522(f). *Id.* at 267.

Maus v. Maus, 837 F.2d 935 (10th Cir.1988), also allowed avoidance of a divorce judgment lien. The parties had agreed to the debtor's receiving the homestead "free and clear of any and all claims" of her former husband.

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[2] Christiansen, Haberman, Haydon, Kinnamon, McGarity and Wilcox, *Marital Property Law in Wisconsin*, ATS-CLE State Bar of Wisconsin (2nd ed. 1986) Ch. 3.

The court found that if a lien existed, it was a judicial lien and was avoidable under 11 U.S.C. § 522(f)(1). In rejecting the reasoning of *Boyd v. Robinson*, the court stated that "[u]nder this theory, the pre-existing interest does not pass to the debtor spouse under the divorce decree, and the lien attaches to the pre-existing interest of the creditor spouse rather than to the interest of the debtor spouse (cite omitted)." *Maus, supra*, at 939. The court discussed spouses' property rights at divorce under Kansas law, which are vested but undetermined until the aggregate estate is equitably divided by the divorce court. Since the divorce court "may" award the entire interest in particular items to one spouse alone, the court concluded, "[t]his construction of the nature of marital rights in Kansas by the Kansas courts clearly defeats the theory of a pre-existing property interest which is *not* extinguished by the divorce decree." (Emphasis added.) *Id.* While the *Maus* result may have been correct because of the parties' agreement, it appears that under Kansas divorce law, which is similar to Minnesota (*Boyd*) and Wisconsin in property division principles, the nondebtor spouse *did* have a pre-existing interest in the property which passed to the debtor via the divorce decree, and the *Maus* court failed to recognize that interest. *Boyd* found that the nondebtor had had a pre-existing ownership interest (as opposed to security interest) to which the lien attached, *Id.* at 1114-15, even though the ownership (title) interest was not retained by the nondebtor after the divorce. Ownership of property and title thereto passed to the debtor spouse by the divorce decree subject to the lien to secure payment. The bankruptcy court in *Maus* had also found that the lien was "tantamount to an equitable mortgage," but nowhere is this addressed by the Court of Appeals. *See In re Maus*, 48 B.R. 948, 951 (Bkrtcy.D.Kan.1985).

In re Grimes, 46 B.R. 84 (Bkrtcy.D.Md.1985), found such a lien avoidable under § 522(f), but it did so without discussion or reference to other judicial decisions. *Id.* at 86. The same court, again without analysis, in *In re Coffman*, 52 B.R. 667 (Bkrtcy.D.Md.1985), made the same finding.

Although the cases just cited are to the contrary, the greater weight of authority is that bankruptcy courts will not allow a debtor to avoid a lien arising from a property settlement in a divorce proceeding. *See, e.g., In re Wicks*, 26 B.R. 769 (Bkrtcy.D.Minn.1982); *In re Scott*, 12 B.R. 613 (Bkrtcy.W.D.Okl.1981). Several bankruptcy courts have based this result, as did *Boyd*, on a finding that the lien did not attach to an interest of the debtor in property. *In re Hart*, 50 B.R. 956, 961 (Bkrtcy.D.Nev.1985); *In re Williams, supra*. Other courts have used a variety of theories to achieve the same result.

One such theory is the equitable lien.[3] In some cases equitable liens have been imposed by bankruptcy courts when ex-spouses filed bankruptcy primarily to avoid compliance with the property division provisions of their divorce decrees. The equitable lien is a special and limited form of constructive trust. Both the equitable lien and the constructive trust are imposed to prevent unjust enrichment.[4] "The difference is that where the constructive trust gives completed title to the plaintiff, the equitable lien gives him only a security interest in the prop-

[3] However, an equitable mortgage is available under Wisconsin law only where a technical error prevented the creation of a legal mortgage. *Matter of Bailey*, 20 B.R. 906, 910 (Bkrtcy.W.D.Wis.1982). The question of perfection of the lien has not been raised in the instant case.

[4] Under certain circumstances, courts will also impose constructive trusts to protect an ex-spouse's interest in property. *In re Graham*, 28 B.R. 928 (Bkrtcy.N.D.Ia.1983). (Ex-wife given a constructive trust in ex-husband's homestead where he used the proceeds of marketable securities and cash value of life insurance policy to buy a home for the purpose of claiming homestead exemption in bankruptcy rather than paying ex-wife from those funds as directed by divorce decree).

erty, which he can then use to satisfy a money claim." *In re Bailey*, 20 B.R. 906, 910 (Bkrtcy.W.D.Wis.1982), quoting from Dobbs, Remedies § 4.3, at 249 (1973).

Where no lien is expressly imposed by the divorce decree, the unsecured property division payments may be discharged in bankruptcy. *See Stout v. Prussel*, 691 F.2d 859, 861 (9th Cir.1982). However, where property division decrees identify certain property as the source of payment, ex-spouses who are to receive payment are recognized as having an equitable lien in that property if unjust enrichment to the other spouse would result without it. *Caldwell v. Armstrong*, 342 F.2d 485, 490 (10th Cir.1965). In Wisconsin, it is not even necessary to identify certain property as the source of payment; equitable liens may be imposed by showing only that unjust enrichment may result to a former spouse if this debt can be discharged or avoided. *In re Bailey, supra.* Since equitable liens are common law liens and not judicial liens, they may not be avoided under 11 U.S.C. § 522(f).

Another theory (not applicable here) by which a lien of this kind has been preserved in bankruptcy is that although it resembles a judicial lien, it is in fact a security interest. The Bankruptcy Code defines a judicial lien as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." 11 U.S.C. § 101(32). A security interest is a "lien created by agreement." 11 U.S.C. § 101(45). Where a property division decree results from an agreement of the parties and expressly includes a lien to secure payment, the lien is considered to have the character of a security interest as well as meeting the definition of judicial lien. Since "security interest" in these situations is considered the more accurate category, such liens have been held to be unavoidable under 11 U.S.C. § 522(f). *In re Hart, supra*, at 961 (lien considered more in nature of purchase money obligation than judicial lien); *In re Rosen*, 34 B.R. 648 (Bkrtcy.E.D.Wis.1983), aff'd. No. 83-C-2002 (1984).

As a result of these court decisions that distinguish between divorce decree liens which are the result of an agreement between the parties and those which are judicially imposed, the impression was created that because the former cannot be avoided as security interests, the latter *can* be avoided as judicial liens. *In re Wicks*, 26 B.R. 769 (Bkrtcy.D.Minn.1982). At least one court has expressly rejected this distinction. *Thomas, supra*, at 13. However, that analysis is unnecessary here given this court's finding that the lien in this case does not attach to an interest of the debtor in property and for that reason is unavoidable.

Valuation of Assets

The debtor's ex-spouse has objected to the valuation of assets set out by the debtor in his schedule. She claims that *res judicata* or collateral estoppel [5] confine the debtor to the findings of the state court divorce decree as to the value of assets.

For either *res judicata* or collateral estoppel to apply, the first requirement is that the claim or issue sought to be precluded be the same as in the prior action. *Klingman v. Levinson*, 831 F.2d 1292 (7thCir.1987). In the two court actions under consideration, the adversary proceeding in bankruptcy and the divorce, there appears to be a common issue: valuation of assets. This apparent commonality is deceiving however because the valuation involves two different dates. In the divorce proceeding, the property was assigned a value several months before the decree of divorce was entered. In bankruptcy, property claimed as exempt must be valued as of the date the petition is filed. 11 U.S.C. 522(a)(2). Real and

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[5] *Res judicata* in its broader sense is sometimes taken to include both concepts. *See Brown v. Felsen*, 442 U.S. 127, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979); *Spilman v. Harvey*, 656 F.2d 224 (6th Cir. 1981).

personal property alike can appreciate or depreciate in a period of several months. Therefore, the valuation of property in a divorce decree cannot be binding on a bankruptcy court. *In re Erwin*, 25 B.R. 363 (Bkrtcy.D. Minn.1982).

An order will be entered denying the debtor's motion under § 522(f)(1).

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 87-02046

IN RE: GERALD J. SANDERFOOT, GERALD SANDERFOOT, GERALD SANDERFOOT, f/d/b/a IMPROVEMENTS UNLIMITED and d/b/a RAGUN'S BAR,
Debtor(s).

ORDER

The court having issued its decision in writing on this date,

IT IS ORDERED:

1. The debtor's motion to avoid the lien of Jeanne Farrey Sanderfoot on his homestead is hereby denied.
2. In light of the court's order denying avoidance of the lien, the objection of Jeanne Farrey Sanderfoot to the debtor's valuation is dismissed as moot.

Dated at Milwaukee, Wisconsin, March 9, 1988.

/s/ Margaret Dee McGarity
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 87-02046

IN RE: GERALD J. SANDERFOOT, GERALD SANDERFOOT, GERALD SANDERFOOT, f/d/b/a IMPROVEMENTS UNLIMITED and d/b/a RAGUN'S BAR,
Debtor.

STIPULATED FACTS AND ISSUES OF LAW

The debtor, Gerald J. Sanderfoot, a/k/a Gerald Sanderfoot, f/d/b/a Improvements Unlimited and d/b/a Ragun's Bar, by his attorney, Harvey G. Samson of Bollenbeck, Block, Seymour, Rowland & Samson, S.C., Jeanne Farrey, f/k/a Jeanne Sanderfoot, by her attorney, Charles J. Hertel, Dempsey, Magnusen, Williamson & Lampe and Chapter 7 Bankruptcy Trustee, Paul G. Swanson, hereby stipulate to the following facts and issues of law with respect to the objection to claim of exempt assets, to motion for lien avoidance and motion for relief from the automatic stay in bankruptcy filed by said Jeanne Farrey in the above-mentioned matter:

I. *Stipulated Facts*

1. The debtor, Gerald J. Sanderfoot, is an adult residing at 540 Island Road, Route 2, Hortonville, Wisconsin 54944. The debtor is also know as Gerald Sanderfoot and Gerry J. Sanderfoot, f/d/b/a Improvements Unlimited and d/b/a Ragun's Bar.

2. The debtor commenced the above-captioned bankruptcy matter by filing a petition for relief under Chapter 7 of the United States Bankruptcy Code with the Bankruptcy Court for the Eastern District of Wisconsin on May 4, 1987. A meeting of creditors pursuant to § 341(a) of the Bankruptcy Code was held on May 28, 1987. The debtor filed the Petition, Schedules and Statement of Financial Affairs with the Bankruptcy Court, a copy of which is attached hereto as Exhibit "A".

3. The debtor and Jeanne Farrey f/k/a Jeanne Sanderfoot, were married. Their marriage was terminated by Judgment of Divorce entered in Circuit Court for Outagamie County, Wisconsin on February 5, 1987. A copy of the Findings of Fact, Conclusions of Law and Judgment of Divorce entered in such action is attached hereto as Exhibit "B".

4. The divorce proceedings between the debtor and Jeanne Farrey were contested proceedings. The issues in dispute included, but were not limited to, property division, valuation of assets, maintenance, child support, and contribution for attorneys fees. Each of the parties presented evidence regarding the value of the parties' marital property.

5. Under the Judgment of Divorce, the debtor was awarded the real property located at 540 Island Road, Route 2, Hortonville, Wisconsin 54944, which was found to have a value of $104,000.00. The Judgment of Divorce further provided that the debtor was ordered to pay Jeanne Farrey the sum of $29,208.44. Such amount was to be paid in two installments of $14,604.22 each, with the first such installment being due and payable on or before January 10, 1987 and the second installment to be due and payable on April 10, 1987. As collateral for and to secure the payment of such amount, the judgment further provides that Jeanne Farrey shall have a lien in and to the real property located at 540 Island Road, Route 2, Hortonville, Wisconsin. The debtor has not paid the amounts required to be paid by him under the said divorce decree.

6. To date Jeanne Farrey has not delivered a quit claim deed to debtor with respect to her interest in and to the real property located at 540 Island Road, Route 2, Hortonville, Wisconsin.

7. The real property located at 540 Island Road, Route 2, Hortonville, Wisconsin consists of 27.43 acres with a residence located thereon. The debtor valued such property on Schedule B-1 as having a market value of $82,750.00. The Circuit Court for Outagamie County, Wisconsin found that the said real property had a value as of September 12, 1986 of $104,000.00. By stipulation, the parties agreed to have the said property appraised by John R. Mau. Mr. Mau valued such property as of October 16, 1987 to be $95,000.00. Attached hereto as Exhibit "C" is a copy of Mr. Mau's appraisal.

8. The Circuit Court for Outagamie County, Wisconsin also valued certain other assets owned by the parties. The values of such assets are set forth on the Findings of Fact, Conclusions of Law and Judgment of Divorce.

9. The debtor has moved the Bankruptcy Court to avoid the lien held by Jeanne Farrey in and to the real property located at 540 Island Road, Route 2, Hortonville, Wisconsin 54944. Jeanne Farrey has objected to such motion.

10. Jeanne Farrey has objected to the debtor's claim of exempt assets on the basis that the debtor has substantially understated the value of the assets claimed as exempt.

11. Jeanne Farrey has further moved the Bankruptcy Court for relief from the automatic stay in bankruptcy on the basis that the debtor has failed to abide by certain other terms and conditions of the judgment of divorce by failing and neglecting to make the contribution towards Jeanne Farrey's attorney's fees in the sum of $1,600.00, by failing to make payments of child support and maintenance as required under said judgment, for failing to

deliver to Jeanne Farrey certain personal property awarded to her under the judgment, and for failing to conduct the auction required thereunder.

II. *Stipulated Issues of Law*

A. Whether the debtor pursuant to 11 U.S.C. § 522 (1), may avoid the lien in and to the real property located at 540 Island Road, Route 2, Hortonville, Wisconsin, granted to Jeanne Farrey under the judgment of divorce entered in Circuit Court for Outagamie County, Wisconsin on February 5, 1987.

B. Whether the debtor is bound by the determination of the value of the assets of the debtor rendered by the Circuit Court for Outagamie County, Wisconsin, as part of the divorce proceedings between the debtor and Jeanne Farrey, under the doctrines of *res judicata* and collateral estoppel.

Dated this the 16th day of December, 1987.

BOLLENBECK, BLOCK, SEYMOUR,
ROWLAND & SAMSON, S.C.
Attorneys for Gerald Sanderfoot

By: /s/ Harvey G. Samson
HARVEY G. SAMSON

DEMPSEY, MAGNUSEN,
WILLIAMSON & LAMPE
Attorneys for Jeanne Farrey

By: /s/ Charles J. Hertel
CHARLES J. HERTEL

/s/ Paul G. Swanson
PAUL G. SWANSON
Bankruptcy Trustee

Name—Harvey G. Samson
Attorney for Petitioner

Address—621 West Lawrence Street
P.O. Box 845
Appleton, WI 54912

Telephone: (414) 731-9101

[*NOTE:* These official forms should be observed and used with such alterations as may be appropriate to suit the circumstances. See Rule 9009.]

VOLUNTARY PETITION

☒ INDIVIDUAL ☐ JOINT PETITION

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

87-02046

IN RE: GERALD SANDERFOOT, GERALD SANDERFOOT, JERRY SANDERFOOT, f/d/b/a IMPROVEMENTS UNLIMITED and d/b/a RAGUN'S BAR

Debtor [set forth here all names including trade names used by Debtor within last 6 years].

Social Security Number 396-48-2556 and Debtor's Employer's Tax Identification No. 359-651

Social Security Number ———— and Debtor's Employer's Tax Identification No. ————

———————

VOLUNTARY PETITION

1. Petitioner's mailing address, including county, is 540 Island Road, Route 2, Hortonville, Outagamie County, Wisconsin, 54944.

2. Petitioner has resided [*or* has had his (their) domicile *or* has had his (their) principal place of business *or* has had his (their) principal assets] within this district for the preceding 180 days [*or* for a longer portion of the preceding 180 days than in any other district].

3. Petitioner is qualified to file this petition and is entitled to the benefits of title 11, United States Code as a voluntary debtor.

4. [*If appropriate*] A copy of petitioner's(s) proposed plan, dated ————, is attached [*or* Petitioner(s) intends to file a plan pursuant to chapter 11 *or* chapter 13] of title 11, United States Code.

5. [*If Petitioner(s) is (are) a Corporation*] Exhibit "A" is attached to and made part of this petition.

6. [If Petitioner(s) is (are) (an) individual(s) whose debts are primarily consumer debts.] Petitioner(s) is (are) aware that [he *or* she] may proceed under chapter 7 *or* 13 of title 11, United States Code, understands the relief available under each such chapter, and chooses to proceed under chapter 7 *or* such title.

7. [If Petitioner(s) is (are) (an) individual(s) whose debts are primarily consumer debts and such petitioner(s) is (are) presented by an attorney.] A declaration or an affidavit in the form of Exhibit "B" is attached to and made a part of this petition.

WHEREFORE, petitioner prays for relief in accordance with chapter 7 [*or* chapter 11 *or* chapter 13] of title 11, United States Code.

Signed: /s/ Harvey G. Samson
HARVEY G. SAMSON
[Attorney for Petitioner(s)]

Address: 621 West Lawrence Street
P.O. Box 845
Appleton, WI 54912

I, GERALD J. SANDERFOOT, the petitioner(s) named in the foregoing petition, certify under penalty of perjury that the foregoing is true and correct.

May 4, 1987

/s/ Gerald J. Sanderfoot
GERALD J. SANDERFOOT
Petitioner

Schedule A-2—Creditors Holding Security.

Name of creditor and complete mailing address including zip code	Description of security and date when obtained by creditor Specify when claim was incurred and the consideration therefore: when claim is subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt.	Indicate if claim is contingent, unliquidated, or disputed.	Market value	Amount of claim without deduction of value of security
1. Home Savings & Loan 320 East College Avenue Appleton, WI 54912-0119	First Mortgage on Residence— Incurred in 1979	Not contingent, unliquidated or disputed	$82,750.00	$37,490.00
2. H. J. Jennerjohn Route 1 Appleton, WI 54915	Second Mortgage on Residence— Incurred 1985-86	Contingent		9,935.00
3. Marine Bank 200 West College Avenue Appleton, WI 54911	Loan—Incurred 1985-86; Security: 1980 Olds. Cutlass Supreme and 1963 Chevy Impala	Not contingent, unliquidated or disputed	1,000.00 500.00	3,332.00
4. Jeanne Sanderfoot Broadway Drive Route 2 Hortonville, WI 54944	Lien Against Residence per Divorce Judgment	Disputed		29,208.00
		Total	$84,250.00	$79,965.00

Schedule B—Statement of All Property of Debtor

Schedules B-1, B-2, B-3 and B-4 must include all property of the debtor as of the date of the filing of the petition by or against him

Schedule B-1.—Real Property

Description and location of all real property in which debtor has an interest (including equitable and future interests, interests in estates by the entirety, community property, life estates, lease-holds, and rights and powers exercisable for his own benefit)	Nature of interest (specify all deeds and written instruments relating thereto)	Market value of debtor's interest with deduction for secured claims listed in Schedule A-2 or exemptions claimed in Schedule B-4
Residence located at 540 Island Road, Route 2, Hortonville, WI 54944:		
#1 E½ of the NW NW less S. 208.72′ of N. 1079.85′ of E. 417.44′ less hwy./con. NW corner section E. 658.88′ S. 57°14′ to P.O.B., S. 1,096.68′ to edge of Rat River 310′N. 85.89′ E. 89.08′ NE 490′ N.248.30′ W. 34.03′ N. 8° W. 101.16′ N. 114.84′ N. 450 W. 35.29° W. 585.25 to P.O.B., Sec. 29, Town of Greenville, Outagamie County. Said parcel contains 5.21 ac.		$72,000.00
#2 E½ of the SW NW less S. 531.34′ of N. 2229.08′ of the E. 370′/Sec. 29, Town of Greenville, Outagamie County. Said parcel contains 15.49 ac.		7,750.00
#3 S. 531.34 of the N. 2229.08′ of the 370′ of the W½ of the NW. Said parcel contains 4.51 ac.	Total	3,000.00
		$82,750.00

STATE OF WISCONSIN
OUTAGAMIE COUNTY

CIRCUIT COURT BRANCH V
FAMILY COURT BRANCH

Case No. 84-FA-657

IN RE THE MARRIAGE OF: JEANNE SANDERFOOT,
Petitioner,

and

GERALD SANDERFOOT,
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT OF DIVORCE

TRIAL

PRESIDING JUDGE: The Honorable Michael W. Gage

PLACE: City of Appleton, Outagamie County, Wisconsin

DATE: September 12, 1986

APPEARANCES:

Petitioner in person and by Robert B. Loomis, attorney for the Petitioner. Respondent in person and by Jerome H. Block, attorney for the Respondent.

I, Judge before whom this action was tried, do hereby make these Findings of Fact, Conclusions of Law and Judgment.

FINDINGS OF FACT

1. For at least six (6) months next preceding the commencement of this action, the Petitioner has been a continuous resident of the State of Wisconsin, and of this County for at least thirty (30) days prior to such commencement; further, that all parties have been duly served, that one hundred twenty (120) days have lapsed since the commencement of this action, and that the parties have been informed of and the moving party has met the counseling requirements of Sec. 767.083, Wis. Stats.

2. The Petitioner in this action is: Jeanne Sanderfoot

ADDRESS: Route 2, Island Road, Box 540
Hortonville, WI 54944

AGE: 36

DOB: August 18, 1950

SSN: 395-52-1465

OCCUPATION: Part-time Maintenance Person

* * * *

VIII. INCOME TAXES

The parties stipulate and agree that for federal and state (Wisconsin) income tax purposes, for the period commencing on and after January 1, 1986, each of the parties' income, wages, earnings or other compensation shall be deemed to be that party's individual or separate property and any deductions, credits, payments or expenses shall also be the individual or separate property of the party making or paying said deduction, credit, payment or expense. Each party specifically agrees to pay his/her own respective tax liability, tax penalty, or tax interest on his/her own individual or separate income subsequent to January 1, 1986, and each party agrees to hold the other harmless for all payments

thereof on each party's own individual or separate income. The parties specifically stipulate and agree that any refunds received by either party on their own individual or separate income for the period of time subsequent to January 1, 1986 shall be that party's own individual or separate property.

IX. PROPERTY DIVISION

The Court made substantial findings concerning the property division and said findings are all found in the transcript concerning the hearing on September 12, 1986.

Real Estate—House. The Court awards the real estate —house to the Respondent herein for $104,000.00

Murphy Construction Contract. The Court does not consider this item a marital debt. The Court finds there is no interest and no demand for payment. Furthermore, Mr. Murphy stated he has an expectation of removing an equal amount of gravel to the amount due. Therefore, the Court assigns no amount as an asset or a debt relating to the Murphy Construction contract. The Court, however, awards the Murphy Construction contract, and any amount of debt or asset relating to the contract, to the Respondent.

Ragun's Bar. The Court made substantial findings which can be found in the transcript concerning the hearing held on September 12, 1986.

The Court awards the business known as Ragun's Bar to the Respondent for the value of $18,000.00 which includes the inventory and all cash on hand.

Motor Vehicles. Per the stipulation of the parties, the Court awards the 1980 Olds automobile to the Respondent for $1,000.00 and the 1963 Chevy automobile to the Respondent for $3,000.00.

1981 Datsun Insurance Proceeds. The Court considers the 1981 Datsun insurance proceeds a marital asset and

awards this marital asset to the Respondent in the amount of $3,400.00.

1985 Income Taxes. The Court awards any refunds or liabilities concerning the 1985 income taxes to be split 50/50 between the parties.

Dan Baehman Receivable. The Court awards the Dan Baehman receivable to the Respondent for no value.

Petitioner's Discrimination Suit. The Court awards the Petitioner's discrimination suit to the Petitioner for no value.

Tom Hast Notes. The Court orders that the Tom Hast notes are not an asset and the Court treats the Tom Hast notes as income which is available for the support obligations and responsibilities of the Respondent herein. Accordingly, the Tom Hast notes that were paid are not considered an asset and are not awarded to either party pursuant to the property balance sheet.

Personal Property Items. The Petitioner is awarded the following items of personal property at the following values:

Personal Property Item	Value
Living room furniture with end tables	$ 700.00
Lamps	40.00
Wooden rocker	60.00
Color TV	125.00
Sanyo VCR—Beta	200.00
Buffet	25.00
High chair and crib	30.00
Kirby vacuum	349.00
Washer and dryer	200.00
Religious material	20.00
Garden set (rakes, shovel, hoe)	30.00
Mechanics set for household	20.00
Dove pictures	25.00
Crochet hat	3.00
Stereo	200.00

Personal Property Item	Value
Cassette player	20.00
Dog clippers	2.00
Ironing board and iron	5.00
Petitioner's books	2.00
Hooked rug and supplies	2.00
Pommander and vase	1.00
Double coffee pot	1.00
Fruit jars	5.00
Canned food in jars	- 0 -
Frozen food	- 0 -
Gardening supplies	10.00
Closepins	1.00
Canners and scales	10.00
Picnic table gift	- 0 -
Macrame hanger	1.00
Scatter rug in bath	1.00
Fabric patterns	2.00
Bathroom scale	1.00
TOTAL	$2,091.00

The Court awards to the Respondent the following personal property items with the appropriate values.

Personal Property Item	Value
Bedroom chair (wicker)	$ 35.00
½ trans	200.00
Gold mirror	10.00
Farm house picture	10.00
Brass leaves	3.00
Picture album	- 0 -
Record albums	20.00
Luggage	25.00
Glasses	1.00
Tupperware	5.00
Fan	5.00
Lawn mower	40.00
King sheets	5.00
Coleman stove and lantern	30.00
Tent	50.00
Lawn chairs	15.00

Personal Property Item	Value
White wool blanket	10.00
Outdoor grill	20.00
Games	10.00
Baking pans	3.00
Plants	5.00
Green bowls	2.00
Hutch	300.00
Dining room table and chairs	75.00
Dishwasher	125.00
Family room furniture with end table	350.00
Tractor and trailer	2,000.00
Guns	575.00
Miscellaneous tools and equipment	4,500.00
TOTAL	$8,429.00

The parties are specifically ordered to make arrangements to have an auction on or before November 12, 1986. The parties are ordered to agree as to the time and place of the auction, the auctioneer, and the method of sale. The items ordered to be sold at the auction are as follows: Stove, refrigerator, downstairs refrigerator, freezer, televisions (1 black and white, 1 remote control color, 1 color), lamps, 2 stereos, desk with chair, bedroom set with 2 nightstands, wicker chair, bedroom lamps, Kirby vacuum, game table with 4 stools, buffet to match dining set, snowmobiles, houseboat, woodstove, lawn mower and trailer, 1 push lawn mower, camping equipment and kitchen, sleeping bags, Weber grill, washer and dryer, canoe.

The Court further orders that the parties shall split the cost of sale of the auction on a 50/50 basis and the net proceeds received from the auction shall be distributed 50/50 between the parties. Both parties are specifically ordered to cooperate with the auction procedure and, in the event, there are any problems concerning the sale of these items at auction, either party has the right to petition to the Judge to have this matter resolved by Court order.

In addition to all of the above, the children are awarded their own respective guns. The children are also awarded the Amphicat, trailer and ice shanty.

The Court specifically orders that the bar of silver was sold and there is no value affixed to this asset.

X. DEBTS AND FINANCIAL OBLIGATIONS

The Court hereby awards the debts and financial obligations of the parties all as follows:

Debts	Awarded To	Amount
Home Savings & Loan—house mortgage	Respondent	$37,490.00
Clearly building debt	Respondent	14,131.00
Dr. Weber	Petitioner	80.00
Carenow	Petitioner	23.00
Nicolet Clinic	Petitioner	98.50
Dr. Pilon	Petitioner	49.60
Attorney Long 50/50 between the parties		
Kindt Corporation	Respondent	493.90
Buss Electric	Respondent	144.98
Ear, nose and throat	Petitioner	52.00
Jim's Plumbing	Respondent	71.77
St. Elizabeth Hospital	Petitioner	31.50
Urology Associates	Respondent	271.00
Radiology Associates	Petitioner	354.50
N. R. A.	Respondent	250.00
Wood and Dale Nursery	Respondent	374.06
Valley Collection Service	Respondent	213.20
Jennerjohn (special assessment)	Respondent	1,467.54
Jennerjohn (interest)	Respondent	1,300.00

(The Court orders that the Respondent shall receive the marital debt share of the Jennerjohn interest debt in the amount of $1,300.00, and any remaining balance due on the Jennerjohn interest debt is an individual debt of the Respondent.)

Marine Bank	Respondent	14.00
$1,000.00 note	Respondent	1,000.00
$6,000.00 note	Respondent	6,000.00
Theda Clark	Respondent	3,399.00
Nicolet Clinic	Respondent	779.00

Debts	Awarded To	Amount
St. Elizabeth Hospital	Respondent	182.00
New London Hospital	Respondent	870.00
Oshkosh Ambulance	Respondent	185.76
Federal tax liens	Respondent	9,000.00
Valley Dermatology	Petitioner	120.00
Outagamie County Human Services	Petitioner	190.00
Lied's (tree)	Respondent	300.00
Smitty's (car)	Respondent	383.00

With the exception of all of the above, which are the specific responsibility of the party the particular debt is awarded to, and which each party shall specifically hold the other party harmless for the payment thereof, each of the parties shall pay and be responsible for his or her own debts and financial obligations due and owing after the commencement of this action, and each shall hold the other harmless for the payment thereof. Neither party shall contract any indebtedness or incur any liability for which the other party may be held liable. Neither party shall charge upon the credit of the other party.

XI. PROPERTY BALANCE PAYOUT FROM RESPONDENT TO PETITIONER AND PROPERTY BALANCE SHEET

The above-described Order of the Court concerning the distribution of the assets and debts of the parties is set forth fully at length in the attached property balance sheet to this Judgment of Divorce, and said property balance sheet is incorporated herein at length as if set forth fully below. The Court hereby orders the Respondent to pay to the Petitioner the amount of $29,208.44, all as follows:

1. $14,604.22 shall be paid from the Respondent to the Petitioner on or before January 10, 1987. The payment of $14,604.22 shall be made payable in cash, certified check or bank money order and shall be made payable to the Herrling, Clark Law Firm Trust Account in the care of the Petitioner herein.

2. . $14,604.22 shall be paid from the Respondent to the Petitioner on or before April 10, 1987. The amount of $14,604.22 shall be made payable in cash, certified check or bank money order and shall be made payable to the Herrling, Clark Law Firm Trust Account in care of the Petitioner herein.

The Petitioner herein shall have a lien against the real estate property of the Respondent for the total amount of money due her pursuant to this Order of the Court, i.e. $29,208.44, and the lien shall remain attached to the real estate property of the Respondent until the total amount of money is paid in full. Specifically, the lien shall attach to the house/real estate of the Respondent located at 540 Island Road, Route 2, Hortonville, Town of Greenville, Outagamie County, Wisconsin, and more specifically and legally described as:

#1 E½ of the NW NW less S.208.72′ of N.1079.85′ of E.417.44′ less hwy/con NW cor sec. E.658.88′ S57dg.14′ to P.O.B. S.1,096.68′ to edge of Rat River NE 310′ N.85.89′E 89.08′ NE 490′ N248.30′ W.34.03′ N.8dg. W.101.16′ N.114.84′ N450 W.35.29dg. W.585.25 to P.O.B. Sec. 29 Town of Greenville, Outagamie County. Said Parcel Contains (5.21-Ac.)

#2 E½ of the SW NW Less S. 531.34′ of N.2229.08′ of the E. 370′/Sec. 29 Town of Greenville, Outagamie County (Said Parcel Contains 15.49-Ac.)

#3 S. 531.34 of the N. 2229.08′ of the E. 370′ of the W½ of the NW (Said Parcel contains 4.51-Ac.).

The Oral Decision of the Court, as set forth above, is considered a full, final, complete and equitable property division, in recognition of a species of community ownership of the marital estate resembling a division of the property between co-owners vested at the time of commencement of this action.

20. *Wisconsin as Forum.* The forum for all disputes shall be the State of Wisconsin, unless the parties otherwise agree in writing.

21. *Divesting of Property Rights: Mutual Releases.* Each party shall be divested of and waives, renounces and gives up, any and all right, title and interest in and to the property awarded to the other. All property and money received or retained by the parties shall be the separate property of the respective parties, free and clear of any right, title, interest or claim of the other party, and each party shall have the right to deal with, and dispose of his or her separate property as fully and effectively as if the parties had never been married, except as expressly provided for in this agreement, and each party accepts the property herein in full satisfaction of all property rights and all obligations arising out of the marital relationship of the parties.

22. *Non-Compliance.* Disobedience of the Court Orders is punishable under Chapter 785 by commitment to the County jail or house of correction until such Judgment is complied with and the costs and expenses of the proceedings are paid or until the party committed is otherwise discharged, according to law.

23. *Restraining Provisions.* Both parties agree not to molest, interfere with, or impose any restraint upon the personal liberty of each other.

24. *Restoration of Name.* The Petitioner is forthwith restored the use of her former surname, to wit: FARREY.

25. *Effective Date.* The effective date of this judgment of divorce is the 12th day of September, 1986.

26. *Execution of Documents.* Now or in the future, upon demand, the parties agree to execute and deliver any and all documents which may be necessary to carry out the terms and conditions of this Judgment.

JUDGMENT IS HEREBY RENDERED, AND THE CLERK IS ORDERED TO ENTER THIS JUDGMENT.

Dated at Oshkosh, Wisconsin, this —— day of ———, 1986.

BY THE COURT:

HONORABLE MICHAEL W. GAGE
Circuit Court Judge, Branch No. V
Outagamie County, Wisconsin

Approved as to form and content
this —— day of ————, 1986.

KATHLEEN GALLES LHOST
Family Court Commissioner
Outagamie County, Wisconsin

Approved as to form and content
this 25th day of November, 1986.

/s/ Robert B. Loomis
ROBERT B. LOOMIS
Attorney for Petitioner

Approved as to form and content
this —— day of ————, 1986.

JEROME H. BLOCK
Attorney for Respondent

SANDERFOOT DIVORCE — September 12, 1986
Case No. 84-FA-657

PROPERTY BALANCE SHEET

A. ASSETS	Husband	Wife
1. Real Estate—House	$104,000.00	$ -0-
2. Murphy Construction Contract	-0-	-0-
3. Ragun's Bar	18,000.00	-0-
4. 1980 Olds	1,000.00	-0-
5. 1963 Chevy	3,000.00	-0-
6. 1981 Datsun Insurance Proceeds	3,400.00	-0-
7. 1985 Income Tax Refunds or Liabilities—50/50 between the parties		
8. Dan Baehman Receivable	X	-0-
9. Petitioner's Discrimination Suit	-0-	X
10. Personal Property Awarded to Parties	8,429.00	2,091.00
11. Remaining Personal Property to be Sold at Auction—50/50 between the parties		
TOTAL ASSETS	$137,829.00	$ 2,091.00
B. DEBTS		
1. Home S. & L.—House Mortgage	37,490.00	-0-
2. Cleary Building	14,131.00	-0-
3. Dr. Weber	-0-	80.00
4. Carenow	-0-	23.00
5. Nicolet Clinic	-0-	98.50
6. Dr. Pilon, M.D.	-0-	49.60
7. Attorney Long—50/50 between the parties		
8. Kindt Corporation	493.90	-0-
9. Buss Electric	144.98	-0-
10. Ear, Nose, Throat	-0-	52.00
11. Jim's Plumbing	71.77	-0-
12. St. Elizabeth Hospital	-0-	31.50
13. Urology Associates	271.00	-0-
14. Radiology Associates	-0-	354.50
15. N.R.A.	250.00	-0-
16. Wood & Dale Nursery	374.06	-0-
17. Valley Collection Service	213.20	-0-
18. Jennerjohn (Special Assessment)	1,467.54	-0-
19. Jennerjohn (Interest)	1,300.00	-0-
20. Marine Bank	14.00	-0-
21. $1,000.00 Note	1,000.00	-0-
22. $6,000.00 Note	6,000.00	-0-
23. Theda Clark	3,399.00	-0-
24. Nicolet Clinic	779.00	-0-

B. DEBTS—Continued	Husband	Wife
25. St. Elizabeth Hospital	182.00	-0-
26. New London Hospital	870.00	-0-
27. Oshkosh Ambulance	185.76	-0-
28. Federal Tax Liens	9,000.00	-0-
29. Valley Dermatology	-0-	120.00
30. Outagamie County Human Services	-0-	190.00
31. Lied's (Tree)	300.00	-0-
32. Smitty's (Car)	383.00	-0-
TOTAL DEBTS	$ 78,320.21	$ 999.10
NET ESTATE	$ 59,508.79	$ 1,091.90
Payout From Husband to Wife	(29,208.45)	29,208.44
	$ 30,300.34	$30,300.34

No. 90-350

In The

Supreme Court of the United States

October Term, 1990

IN RE GERALD J. SANDERFOOT, DEBTOR,
JEANNE FARREY, f/k/a JEANNE SANDERFOOT,

Petitioner,

v.

GERALD J. SANDERFOOT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

For Respondent,
GERALD J. SANDERFOOT:

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTION PRESENTED

This matter presents a single issue of federal law:

Whether a debtor in a bankruptcy action may, pursuant to 11 USC Sec. 522(f), avoid a lien against homestead real property granted to a former spouse as part of a contested property division in a divorce proceeding.

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ACQUIESCE OF RESPONDENT REGARDING CERTAIN OF PETITIONER'S STATEMENTS

Respondent, Gerald J. Sanderfoot, agrees with the Petitioner's statement as to the following:

A. Opinions Below

B. Jurisdiction

C. Federal Statutes Involved

D. State Statute Involved

STATEMENT OF THE CASE

Nature of the Case: Respondent agrees with the factual statements of Petitioner regarding the division of authority in the United States Courts of Appeal on the issue presented.

Statement of Facts: Respondent agrees with Petitioner's statement of facts, with the following exceptions:

Judgment of divorce and property division was granted by the Circuit Court for Outagamie County, Wisconsin, on September 12, 1986 [See Section 806.06(1)(d), Wisconsin Statutes]. Written Judgment of Divorce was entered on February 5, 1987 [See Section 806.06(1)(b), Wisconsin Statutes]. The Judgment of Divorce terminated the marital relationship of the parties and fixed their respective financial rights as to property division effective September 12, 1986 [See Section 767.37(3), Wisconsin Statutes, and *Brandt v. Brandt*, 145 Wis 2d 394, 421, 427 NW 2d 126, 136 (1988)].

The Petitioner's statement of facts appears to argue that the property division equalizing payment was solely

for the value of the homestead of the parties. Contrary to this position, the lien awarded to Petitioner was based upon the entire marital estate of the parties. See Appendix to Petition for Writ of Certiorari, App. pp. 49a-61a.

Additionally, whether or not Mr. Sanderfoot made all or none of the payments ordered is totally irrelevant to the issue presented.

Procedural History: Respondent agrees with Petitioner's statement of procedural history.

Basis for Federal Jurisdiction: Respondent agrees with Petitioner's statement.

REASONS FOR DENYING THE WRIT

I. WHILE THERE IS AN EVEN DIVISION OF AUTHORITY BETWEEN THE CIRCUIT COURTS OF APPEAL, THE DECISION OF THE SEVENTH CIRCUIT IS BETTER REASONED.

There is no question that the decision of the Seventh Circuit Court of Appeals results in an even division of authority on this issue in the Courts of Appeal that have reviewed the question. The difficulty with Petitioner's position is, however, that the cases represented by *In re Pederson*, 875 F2d 781 (9th Circuit, 1989), are clearly better reasoned.

The attempts of the *Boyd v. Robinson*, 741 F2d 1112 (8th Circuit, 1984), line of cases to which Petitioner subscribes, are convoluted and unpersuasive, relying on several different theories to find that a lien in a contested divorce is not a judicial lien. This line of decisions ignores

the clear and unambiguous language of the Bankruptcy Code.

The Bankruptcy Code defines judicial lien as follows:

> 11 USC Section 101(32): " 'judicial lien' means a lien obtained by judgment, levy, sequestration or other legal or equitable process or proceeding."

To say that a divorce judgment does not fit that definition totally ignores the clear meaning of the quoted section.

To argue, as Petitioner does, that the lien recognizes some type of pre-existing rights ignores the divorce court's judgment and the provisions of Section 767.37(3), Wisconsin Statutes.

While the waters are muddy, they are muddied by the attempts of some courts to read language into the Bankruptcy Code which is not there. As pointed out by the Seventh Circuit in this case:

> "We conclude that *Pederson* and its progeny are better reasoned and faithful to the plain language of Section 522(f)." *Sanderfoot*, 899 F2d at 605, Petitioner's App. at 16a.

II. THE SEVENTH CIRCUIT'S DECISION DOES NOT HANDICAP THE STATE DIVORCE COURTS.

Petitioner sets forth the proposition that the uncertainty surrounding the issue presented will severely handicap state divorce courts and invades the province of the states. Petitioner uses too broad a brush.

The Seventh Circuit's decision does no more and no less than recognize that a property division balancing payment is dischargeable in bankruptcy.[1]

The decisions of the Seventh and Ninth Circuits recognize that if the property division payment is dischargeable, to say that the judicial lien which such a judgment imposes is not voidable as to exempt property is, in effect, a right without a remedy. Contrary to Petitioner's statements, these decisions do not affect liens to secure "nondischargeable obligations like child support" (Petitioner's Brief for Writ, at page 15), for 11 USC Sec. 522(c) specifically provides that exemptions do not apply to child support and alimony.

While the decision of the Seventh Circuit may, indeed, make the divorce court's job more difficult, it does not render it impossible, for pursuant to state law, divorce courts are vested with significant discretion in fashioning a reasonable, just and equitable property division, based upon all of the circumstances of the parties. See Section 767.255, Wisconsin Statutes, and, for example, *Popp v. Popp*, 146 Wis 2d 778, 786, 432 NW 2d 600 (1988).

III. THE DECISION OF THE SEVENTH CIRCUIT CARRIES OUT THE INTENT OF CONGRESS.

Petitioner argues that the Seventh Circuit erred, as a matter of law, by ignoring the intent of Congress. In support of this contention, Petitioner argues that 11 USC

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[1] 11 USC Section 523 sets forth exemptions to discharge. While child support and separate maintenance payments are not dischargeable, property division payments clearly are.

Section 522(f) is ambiguous and thus the court must look beyond the language of the statute and even if the language is not ambiguous, congressional intent is relevant where "literal application of a statute will produce a result demonstrably at odds with the intention of the drafters . . . " *United States v. Ron Pair Enterprises, Inc.*, 489 US 235 (1989) at pp. 20-21 of Petitioner's Brief.

The question is, thus, what was the intent of Congress in enacting 11 USC Section 522(f)?

In making such an analysis, the starting point is the applicable law. 11 USC Section 522(f) states, in full:

> "(f) Notwithstanding any waiver of exemptions; the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) on this section; if such lien is –
>
> (1) a judicial lien; or
>
> (2) a nonpossessory, nonpurchase money security interest in any –
>
> (A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments or jewelry that are held primarily for the personal, family or household use of the debtor or a dependent of the debtor; or
>
> (B) implements, professional books or tools of the trade of the debtor or the trade of a dependent of the debtor; or
>
> (C) professionally prescribed healthaids for the debtor or a dependent of the debtor."

While Section 522(f)(1) is admittedly designed to protect a debtor from a race to the courthouse, neither the language of the statute nor the legislative history places a time limit upon the avoidance right. Thus, a debtor can avoid a judicial lien if it was obtained one week, one year or five years before the filing of bankruptcy if that lien impairs an interest in exempt property. See House Report No. 95-595, 95th Congress 1st Session 362 (1977).

The next issue is what is a judicial lien? That question is answered by the Bankruptcy Code itself in 11 USC Section 101(32):

> "(32) 'judicial lien' means lien obtained by judgment, levy, sequestration or other legal or equitable process or proceeding."[2]

To ask the question, as Petitioner does, of whether the term "judicial lien" encompasses liens in a divorce judgment is redundant. If a court renders a judgment in a divorce action and the judgment has a provision for a nonconsensual lien, can it be other than a judicial lien?[3]

Contrary to Petitioner's argument, the judicial lien granted in this case by the divorce court was not granted, " . . . in exchange for the court's award of the homestead of the debtor." Rather, it was an award of money to

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[2] 11 USC 101(33) defines lien: "(33) 'lien' means a charge against or interest in property to secure payment of a debt or performance of an obligation."

[3] Regarding consensual liens, see 11 USC 101(47) defining "security interest."

equalize the division of a marital estate with gross assets of $139,920.00 and debts of $79,319.31.[4]

Petitioner's argument also ignores the code definition of creditor contained in 11 USC 101(9):

> "(9) 'creditor' means –
>
> (A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor . . . "

Reviewing the sections above referred to, it is clear as to the definitions and meanings of the applicable law. Did Congress intend the result reached by the Seventh and Ninth Circuits? Yes, for Congress did not include in the applicable statutes an exception for a judicial lien in a divorce action.

Nowhere in any brief submitted in this case, either in the Bankruptcy Court, District Court, Circuit Court of Appeals nor the Brief for Writ of Certiorari has Petitioner cited a single word from Congress which would permit the interpretation she seeks.

The purpose of Section 522(f)(1) is to permit a debtor to avoid judgment liens which impair exempt property. The decision of the Seventh Circuit in this case, and the Ninth Circuit in *In re Pederson*, 875 F2d 781 (9th Cir., 1989), are correct in the interpretation and application of the United States Bankruptcy Code to the issue presented.

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[4] Judgment of Divorce, Petitioner's App. pp. 51a to 56a. $137,829 of assets and $78,320.21 of debt were awarded to debtor or a net of $59,508.79.

CONCLUSION

The decision of the Seventh Circuit Court of Appeals is correct. The Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Counsel for Respondent

(3)

No. 90-350

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

IN RE GERALD J. SANDERFOOT, DEBTOR.

JEANNE FARREY, f/k/a JEANNE SANDERFOOT,
Petitioner,

v.

GERALD J. SANDERFOOT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE PETITIONER

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Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

Does the federal bankruptcy code give an individual, awarded his spouse's interest in the family's exempt homestead in a contested divorce case, the absolute right to avoid the homestead lien simultaneously awarded the debtor's spouse in the same divorce judgment?

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BRIEF FOR THE PETITIONER

CITATION OF OPINIONS AND JUDGMENTS BELOW

The 2-1 opinion of the U.S. Court of Appeals for the Seventh Circuit is reported at 899 F.2d 598. It is reprinted in the appendix to the petition for a writ of certiorari, Appendix ("App."), pp. 1a-21a, submitted in lieu of a Joint Appendix pursuant to Rule 26.7 and this Court's January 7, 1991 order.

The decision of the U.S. District Court for the Eastern District of Wisconsin (Gordon, J.), which the Court of Appeals affirmed, is reported at 92 B.R. 802. App., pp. 22a-24a.

The decision of the U.S. Bankruptcy Court for the Eastern District of Wisconsin (McGarity, J.), which the district court reversed, is reported at 83 B.R. 564. App., pp. 25a-38a.

The Findings of Fact, Conclusions of Law, and Judgment of Divorce rendered by the Outagamie County, Wisconsin, Circuit Court has not been reported. Portions of this document are reprinted in the appendix. App., pp. 49a-61a.

JURISDICTIONAL STATEMENT

This is an appeal from the judgment and the majority opinion entered by the Court of Appeals on March 30, 1990. This Court has jurisdiction over the appeal under 28 U.S.C. § 1254(1), having granted the petition for a writ of certiorari on November 26, 1990. 59 U.S.L.W. 3391 (November 27, 1990). The petition was filed on August 27, 1990, pursuant to an extension of time granted by Justice Stevens.

No jurisdictional issues have been raised at any point in this case. The bankruptcy court had jurisdiction over the debtor's Chapter 7 petition under 28 U.S.C. § 157, the federal district court had original bankruptcy jurisdiction under 28 U.S.C. § 1334 and appellate jurisdiction under 28 U.S.C. § 158, and the Court of Appeals heard the case under 28 U.S.C. § 158(d).

FEDERAL STATUTES INVOLVED

11 U.S.C. § 522 provides in part:

Exemptions.

* * * *

(b) . . . an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. . . . Such property is—

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2) (A) of this subsection specifically does not so authorize; or, in the alternative,

(2) (A) any property that is exempt under . . . State or local law that is applicable on the date of the filing of the petition. . . .

* * * *

(c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor . . . except—

. . . .

(2) a debt secured by a lien that is—

(A) (i) not avoided under section (f) or (g) of this section. . . .

* * * *

(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

(1) a judicial lien. . . .

11 U.S.C. § 101 provides in part:

Definitions. In this title—

* * * *

(32) "judicial lien" means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding;

(33) "lien" means charge against or interest in property to secure payment of a debt or performance of an obligation.

STATE STATUTE INVOLVED

Wis. Stat. § 815.20. *Homestead exemption definition.*

(1) An exempt homestead . . . selected by a resident owner and occupied by him or her shall be exempt from execution, from the lien of every judgment and from liability for the debts of the owner to the amount of $40,000, except mortgages, laborers', mechanics' and purchase money liens and taxes and except as otherwise provided. . . .

STATEMENT OF THE CASE

For most American families, their home is their principal financial asset. For many, it is the only asset with substantial, lasting value. The states historically have recognized the homestead's unique contribution to the family, intangible as well as tangible, by providing a special measure of protection for it from the claims of creditors. In a contested divorce, the home's value and importance invariably make it the focus of the state court's obligation to ensure an equitable division of the marital estate. This case will determine the vitality of these established state interests in the family—by deciding whether they are complemented by the bankruptcy code or whether, in the words of the dissenting judge in the Court of Appeals, a debtor can use the code "to steal from his former wife. . . ."

A state court ordered Gerald J. Sanderfoot and Jeanne Farrey divorced on September 12, 1986, ending their marriage and dividing their marital estate in half. The court awarded Mr. Sanderfoot his wife's entire interest in the family's home, virtually all of the other assets and most of the liabilities of the marriage. To ensure an equal property division and to recognize Ms. Farrey's contribution to the marriage and her joint ownership of the marital estate, the divorce judgment required Mr. Sanderfoot to pay her about $29,000.00. The court secured that specific obligation with a lien on the home. Three months later, Mr. Sanderfoot filed for bankruptcy and ultimately avoided the lien under 11 U.S.C. § 522 (f)(1), eliminating Ms. Farrey's share of the marital estate.

Four courts of appeals, applying that provision of the bankruptcy code to remarkably similar facts, have reached remarkably dissimilar results. Only one circuit has been able to render a unanimous decision. In this case, a divided panel of the Seventh Circuit affirmed the federal district court's decision that permitted Mr. Sanderfoot to

avoid the lien. The Ninth Circuit is in accord. The Eighth and the Tenth Circuits, however, have refused to allow debtors to nullify divorce judgments that awarded homestead liens to the debtors' spouses. This Court's resolution of this dispute will have a substantial impact on the work of the federal courts and on the lives of married couples who, until now, have turned to the state courts for fairness and finality when their marriages dissolve.

The Divorce. The facts of this case are undisputed. Jeanne Farrey and Gerald Sanderfoot married on August 12, 1966. They eventually built a home, together, on 27 acres of land in Hortonville, Wisconsin, where they raised their three children. More than 20 years after their marriage, they were granted a divorce by the Outagamie County Circuit Court after a trial contesting child support, maintenance and the division of their property.

The state court's September 12, 1986 bench decision resolved all of the contested issues and terminated the marriage. *See* Wis. Stat. § 767.37(3). Embodied in a formal divorce judgment entered on February 5, 1987, App. at 49a-61a, the decision ordered Mr. Sanderfoot to pay child support, maintenance, and some of the attorneys' fees incurred by his wife. It also awarded each party precisely one-half of their $60,600.68 net marital estate. *Id.* at 56a, 61a. The decree reflected Wisconsin's statutory presumption that the marital estate "be divided equally between the parties." Wis. Stat. § 767.255.

For her share, Ms. Farrey received a few items of personal property and the right to half the proceeds from a court-ordered auction of furniture from the home. The court gave Mr. Sanderfoot sole title to all of the land and the family home, which it valued at $104,000.00, and all of the remaining personal property, including two cars and a business. App. at 51a. The court decree also allocated the couple's liabilities. After this initial assign-

ment of assets and debts, Mr. Sanderfoot had a net award of $59,508.79. Ms. Farrey had $1,091.90. *Id.* at 60a-61a.

To equalize the property division and reflect Ms. Farrey's property interests, the trial court awarded her $29,208.44, half of the difference in the value of their net assets. The court ordered Mr. Sanderfoot to pay that amount in two equal installments—the first due on January 10, 1987, the second on April 10, 1987. The court awarded Ms. Farrey, at the same time and in the same divorce decree, a lien against the family home to implement the property division. "[T]he lien shall remain attached to the real estate property of the Respondent [Mr. Sanderfoot]," the judgment said, "until the total amount of money is paid in full." *Id.* at 57a.

The court's September 12, 1986 bench decision and the divorce judgment itself explained the property division:

> [It is] a full, final, complete and equitable property division, in recognition of a species of community ownership of the marital estate resembling a division of the property between co-owners vested at the time of commencement of this action.

Id. at 58a. The judgment also "divested" each party of all "right, title and interest" in the property awarded to the other party "except as expressly provided. . . . Each party accepts the property herein in full satisfaction of all property rights and all obligations arising" from the marriage. *Id.*

The Bankruptcy Proceedings. On May 4, 1987, three months after the divorce judgment, Mr. Sanderfoot filed a Chapter 7 bankruptcy petition. *Id.* at 44a. By then, he still had not "complied with a single order of the state court." *In re Sanderfoot*, 83 B.R. 564, 565 (Bankr. E.D. Wis. 1988), App. at 22a, 26a. The facts were undisputed, the bankruptcy court noted, and Mr. Sanderfoot's conduct clear:

> He had not conducted the auction, delivered the personal property to his ex-wife, or made a single payment toward child support, maintenance or attorney fees. He had not made the cash payments that were ordered by the court to be made to his ex-wife as compensation for her interest in the [homestead] property.

Id. As a result, neither Ms. Farrey nor the state court ever released the lien on the homestead. Stipulated Facts and Issues of Law, ¶ 6, App. at 40a, 42a.

Mr. Sanderfoot listed the marital home on the schedule of assets submitted with his bankruptcy petition, identifying it as exempt homestead property and Ms. Farrey's lien as "[d]isputed." App. at 47a-48a; *see* Bankruptcy Rule 4003(a). The federal homestead exemption in 11 U.S.C. § 522(d)(1) is only $7,500.00. However, the bankruptcy code permits the debtor instead to invoke the state homestead exemption, 11 U.S.C. § 522(b)(2)(A), and Mr. Sanderfoot did that to try to protect his equity in the home "to the amount of $40,000."[1] Wis. Stat. § 815.20.

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[1] The bankruptcy court did not resolve the parties' dispute over the value of the home nor the collateral dispute over Mr. Sanderfoot's equity in it. The Court of Appeals and the district court concluded that, whatever the amount of equity he had, Ms. Farrey's lien impaired it under section 522(f)(1). *In re Sanderfoot*, 899 F.2d at 599 n.3, App. at 3a n.3; *id.* at 600 n.5 and n.6, App. at 4a n.5, 5a n.6; and, *id.* at 603 & n.13, App. at 11a & n.13. According to the debtor's bankruptcy schedules, moreover, the only other secured claims against the property were two mortgages totaling just under $50,000.00. App. at 47a. That left Mr. Sanderfoot with at least some equity that a judicial lien could impair, accepting even his bankruptcy valuation of the property at only $82,750.00. *See* 83 B.R. at 567, App. at 29a; *see also In re Pederson*, 875 F.2d 781, 782 & n.2 (9th Cir. 1989).

Regardless of Mr. Sanderfoot's equity, Ms. Farrey has at best a worthless unsecured claim unless she can enforce the lien. *See* 11 U.S.C. § 506(a). Personal debts are dischargeable in bankruptcy under 11 U.S.C. § 727(b). Unless they have been avoided, however, liens are not dischargeable. 11 U.S.C. § 522(c)(2)(A)(i); *see infra* at 12-13. The bankruptcy court entered a final order on February 10, 1989, discharging all of Mr. Sanderfoot's personal debts.

Mr. Sanderfoot next filed a motion under 11 U.S.C. § 522(f)(1) to avoid Ms. Farrey's lien against the property, claiming it was a judicial lien that impaired his homestead exemption. On March 9, 1988, the bankruptcy court denied Mr. Sanderfoot's motion. 83 B.R. at 571, App. at 38a; *see* App. at 39a. The court reviewed the bankruptcy code's legislative history to determine the purpose of the lien "fixing" and avoidance statute. "[T]he policy behind 11 U.S.C. § 522(f)(1) was not to circumvent a divorce court's decision," Judge M. Dee McGarity concluded, but to allow the debtor to prevent creditors from destroying statutory exemptions by suing the debtor shortly before bankruptcy. 83 B.R. at 566, App. at 28a. The "fixing of a lien on an interest of the debtor," the bankruptcy court found, had never occurred to trigger the avoidance statute:

> In this case, regardless of how title was previously held [by the divorcing parties], the debtor acquired his interest by virtue of the divorce judgment and subject to the lien. The lien did not attach to the debtor's interest, and it is accordingly not avoidable.

Id. at 33a.

Mr. Sanderfoot appealed the bankruptcy court's order to the U.S. District Court for the Eastern District of Wisconsin. On October 4, 1988, the district court reversed the bankruptcy court's decision and permitted Mr. Sanderfoot to avoid the lien. *In re Sanderfoot*, 92 B.R. 802 (E.D. Wis. 1988), App. at 22a-24a.

Judge Myron L. Gordon rejected the bankruptcy court's conclusion that the lien had not attached to the debtor's property. Instead, the district court found that the divorce judgment had extinguished *all* of the property interests held by the parties, creating new interests: Mr. Sanderfoot received the home, Ms. Farrey a lien against it. Thereafter, when Mr. Sanderfoot filed for bankruptcy, section 522(f)(1) allowed him to avoid the "judicial lien" that had "fix[ed]" against his property interest. *Id.*, App. at 24a.

The Court of Appeals' Decision. Ms. Farrey appealed, and the Seventh Circuit on March 30, 1990 affirmed the district court's decision. *In re Sanderfoot*, 899 F.2d 598 (7th Cir. 1990), App. at 1a-2a.[2] After acknowledging the "difficulty" of the issue, *id.* at 600, App. at 5a, the court's majority found dispositive the fact that the divorce judgment had conveyed sole title to the family's home to Mr. Sanderfoot. The court concluded that Ms. Farrey's lien against the property, obtained by "legal proceedings," fit the definition of "judicial lien" in 11 U.S.C. § 101(32) making it avoidable under section 522(f)(1). *Id.* at 603, App. at 11a. Like the district court, the Court of Appeals' majority ignored the statute's legislative history and purpose.

In a sharply-worded dissent, Judge Richard Posner said the majority's misunderstanding of the lien-avoidance provision had allowed the bankruptcy code to become a "tool by which bounders defraud their spouses." *Id.* at 606, App. at 18a. A proper reading of the statute, on the other hand, would recognize the lien and "do justice here without deforming the Bankruptcy Code." *Id.* at 607, App. at 20a. Since the lien "was created in the same document" that gave the husband title to the property, Judge Posner concluded, the "lien qualified that interest from the start. There was no instant at which [Mr.] Sanderfoot owned the property free and clear of the wife's interest." *Id.*, App. at 21a. Mr. Sanderfoot never had sole title to the property until the court imposed a lien on it and, accordingly, the lien was not avoidable.

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[2] The district court's decision eliminated Ms. Farrey's secured interest in the homestead and her secured claim against the debtor's estate, making it a "final" decision and order appealable under 11 U.S.C. § 158(d) even though the bankruptcy proceeding itself had not concluded. *See Matter of Morse Electric Co., Inc.*, 805 F.2d 262, 264 (7th Cir. 1986); *Matter of Fox*, 762 F.2d 54, 55 (7th Cir. 1985).

The Seventh Circuit's majority and dissenting opinions both analyzed the conflict in the circuits. When the bankruptcy court denied Mr. Sanderfoot's motion to avoid the lien, it relied on *Boyd v. Robinson*, 741 F.2d 1112, 1114-15 (8th Cir. 1984), which held that a lien awarded in a divorce judgment protects the "preexisting interest" of the spouse who loses title to the home. The lien did not attach to the debtor's interest, the Eighth Circuit's majority concluded, because the divorce judgment awarded the debtor the spouse's interest in the home already subject to the lien. Reversing the bankruptcy court in this case, the Seventh Circuit affirmed the district court, which specifically had "rejected the reasoning of *Boyd* and held that the divorce decree both extinguished all preexisting interests and simultaneously created new interests." 899 F.2d at 600, App. at 5a.

The Seventh Circuit's majority relied on *In re Pedersen*, 875 F.2d 781 (9th Cir. 1989), a case that had endorsed the position of the dissenting judge in the *Boyd* decision: "the lien *must* have attached to [the debtor's] interest in the house, for no one else possessed any ownership interest in the house." *Id.* at 783, *quoting* 741 F.2d at 1115 (Ross, J., dissenting) (emphasis in the original). Judge Posner's dissent here endorsed the *Boyd* majority's decision and its rationale, which he said had been adopted "by most bankruptcy judges." App. at 21a.[3]

The majority decisions in the Seventh and Ninth Circuits also cited the holding in *Maus v. Maus*, 837 F.2d 935 (10th Cir. 1988), that a lien created by a divorce decree was a "judicial lien" if the property settlement agreement incorporated into the decree specifically made the grant of the homestead property free and clear of all

[3] The dissent cited three illustrative bankruptcy court decisions, 899 F.2d at 607, App. at 21a. The majority opinion itself noted 11 other bankruptcy and district court decisions that also had refused to apply the lien avoidance statute to similar facts. *Id.* at 601 & n.7, App. at 7a; *id.* at 604 & n.14, App. at 13a. Neither compilation purported to be exhaustive, and a full list of the reported decisions on this issue appears in the Appendix to this brief.

claims of the other spouse. However, even these decisions recognized that the more recent Tenth Circuit cases had expressly "limited" the application of *Maus* to cases where "the divorce decree itself does not specifically create a lien." 899 F.2d at 603, App. at 12a, *quoting In re Borman*, 886 F.2d 273, 274 (10th Cir. 1989); *accord In re Donahue*, 862 F.2d 259 (10th Cir. 1988). They also distinguished *Maus* because it did not involve a contested divorce. *See infra* at 14 n.5. The latest Tenth Circuit cases concluded, by contrast, without dissent, that the simultaneous award of homestead property to one spouse and a homestead lien to the other spouse gave rise to an "equitable lien against the property, which secured the debt." 886 F.2d at 274.

In their result, then, if not in their rationale, the Seventh and Ninth Circuits are allied against the Eighth and Tenth Circuits over the interpretation of section 522 (f)(1). There is no disagreement among the circuits, however, on one point: the federal courts have encountered "some difficulty in defining precisely the interest of an ex-spouse arising out of a property settlement made during a divorce proceeding." *Donahue*, 862 F.2d at 262. The waters have been "muddied" by the tension inherent among these cases. *In re Rittenhouse*, 103 B.R. 250, 252 (D. Kan. 1989).

Statutory Framework. For all of the controversy, there is little legislative history for section 522(f)(1) and its complementary definitions in the bankruptcy code. The provision was incorporated in the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, a comprehensive revision of bankruptcy law, and the section has not been amended substantively. In chapter 7, the code gives individual debtors the opportunity for a "fresh start," providing for the liquidation of their assets to pay some of their liabilities and then discharging most of the debtor's unpaid debts. *See* 11 U.S.C. §§ 523, 541, 726, 727.

There are significant exceptions, however, to the law's liquidation and dischargeability provisions. Section 522 establishes a series of "exemptions" that permit a debtor to insulate specific assets from the bankruptcy process, putting them beyond the reach of creditors. "[P]roperty exempted under this section is not liable . . . for any debt of the debtor. . . ." 11 U.S.C. § 522(c). In a "significant" break with the past, the 1978 law gave individual debtors "a choice between exemption systems." H.R. Rep. No. 595, 95th Cong., 1st Sess. 360-61 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5963, 6316-17. Rather than relying solely on the exemptions defined by state law, a debtor now can choose either the exemptions available under "State or local law," 11 U.S.C. § 522(b)(2)(A), or the new federal exemptions specified in section 522(d) unless state law prohibits the use of the federal exemptions. 11 U.S.C. § 522(b)(1).[4]

The reform act did *not* change the fundamental nature of property subject to the bankruptcy code or to the federal or state exemptions. Liens and other secured interests generally survive bankruptcy.

> Property may be exempted even if it is subject to a lien, but only the unencumbered portion of the property is to be counted in computing the "value" of the property for the purposes of exemption. . . . The remaining value of the property will be dealt with in the bankruptcy case as is any interest in property that is subject to a lien.

H.R. Rep. No. 595 at 361, 1978 U.S. Code Cong. & Ad. News at 6316-17. In fact, Congress in 1978 specifically preserved a concept that has been integral to the law of

[4] While many states have chosen to eliminate the debtor's ability to choose the federal exemptions, Wisconsin has not. This Court heard oral argument on November 5, 1990 in a case that may determine the application of section 522(f) in states that have "opted out" of the federal exemptions. *In re Owen*, 877 F.2d 44 (11th Cir. 1989), *cert. granted sub nom. Owen v. Owen*, —— U.S. ——, 110 S.Ct. 2166 (1990).

bankruptcy for at least 100 years: "[t]he setting apart of the homestead to the bankrupt [debtor] . . . did not relieve the property from the operation of liens created by contract before the bankruptcy." *Long v. Bullard*, 117 U.S. 617, 620-21 (1886). A discharge in bankruptcy "will not prevent the enforcement of valid liens—even on exempt property." 3 *Collier on Bankruptcy*, § 522.04, p. 522-17 (15th ed. 1989); *see Louisville Bank v. Radford*, 295 U.S. 555, 582-83 (1935) (bankruptcy does not destroy a mortgage "even of exempt property").

While preserving the *Bullard* principle in section 522(c)(2)(A)(i), Congress did amend the bankruptcy law to permit a debtor to avoid the "fixing" of some liens, *see, e.g.*, 11 U.S.C. §§ 545 (statutory liens) and 547 (general preference powers), and to provide additional protection for the exemptions recognized in section 522. *See* H.R. Rep. No. 595 at 126-27, 1978 U.S. Code Cong. & Ad. News at 6087-88. Section 522(f), at issue here, protects the debtor. Notwithstanding the established distinction between debts and liens, the debtor *can* avoid a judicial lien "on any property to the extent that the property could have been exempted in the absence of the lien." H.R. Rep. No. 595 at 362, 1978 U.S. Code Cong. & Ad. News at 6318. The debtor also can avoid any "nonpurchase-money security interest" in any specified household and personal goods, tools and implements. 11 U.S.C. § 522(f)(2).

There is *only* one substantive explanation for the lien avoidance provision in the code's entire legislative history:

> The first right [sec. 522(f)(1)] allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists to provide relief for an overburdened debtor. If a creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions.

H.R. Rep. No. 595 at 126-27, U.S. Code Cong. & Ad. News at 6087-88. Most of the opinions that have refused to allow a debtor to aviod a homestead lien awarded

on divorce have quoted this passage. *See, e.g., In re Sanderfoot*, 899 F.2d at 606, App. at 21a (Posner, J., dissenting); *In re Sanderfoot*, 83 B.R. at 566, App. at 28a; *In re Thomas*, 32 B.R. 11, 12 (Bankr. D. Or. 1983).

The exemption concept embodied in section 522(f)(1) had its genesis in the Bankruptcy Act of 1867, 14 Stat. 523, later expanded by section 67 of the 1898 Bankruptcy Act, 30 Stat. 544. *See* 4 *Collier on Bankruptcy*, § 67.01, pp. 18-19 (14th ed. 1978). Before its repeal, section 67a invalidated "[a]ny lien against the bankrupt's property obtained by attachment, judgment, levy or other legal or equitable process or proceedings within the four-month period" before filing. 11 U.S.C. § 107(a) (1976); 1A *Collier on Bankruptcy*, § 6.12, pp. 865-66 (14th ed. 1978). The debtor had to be insolvent at the time the lien attached, however, to qualify for section 67a's protections. 11 U.S.C. § 107(a) (1976); *see also In re Ashe*, 712 F.2d 865, 866-8 (3d Cir. 1983), *cert. denied sub nom. Commonwealth Nat'l Bank v. Ashe*, 464 U.S. 1024 (1984), *reh'g denied*, 466 U.S. 963 (1984). The reform act eliminated the insolvency and time limit provisions, making any judicial lien on exempt property theoretically avoidable.

There is even less legislative history for the definitions applicable to section 522(f). While the bankruptcy code defines a "lien" generally at 11 U.S.C. § 101(33), it recognizes three specific liens: the "judicial lien" at issue here in section 101(32), a "statutory lien" in section 101(47), and a "security interest" that, under section 101(45), means a "lien created by an agreement."[5] The

[5] The property division in this case was contested. Stipulated Facts and Issues of Law, ¶ 4, App. at 41a. Accordingly, this appeal does not test the applicability of section 522(f)(1) to a consensual lien—imposed and accepted, for example, by the parties through a stipulation—that, in turn, is incorporated into a divorce judgment. *See, e.g., Maus v. Maus*, 837 F.2d 935; *In re Hart*, 50 B.R. 956, 961 (Bankr. D. Nev. 1985). It would be ironic, at best, if a lien imposed by a court in a contested property division could be avoided while a lien imposed by the parties themselves could not be avoided. That would reward the litigious spouse who forces the court to make the property division.

three lien types may be mutually exclusive, *see* S. Rep. No. 989, 95th Cong., 2d Sess. 25 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5811, but they are not exhaustive. A number of bankruptcy court decisions have applied an "equitable lien" theory to refuse to allow a debtor to avoid a homestead lien held by a former spouse. *See, e.g., In re Borman*, 886 F.2d 273; *In re Donahue*, 862 F.2d 259; *Matter of Bailey*, 20 B.R. 906 (Bankr. W.D. Wis. 1982); *infra* at 25 & n.12.

In addition to section 522(f)(1), the code gives the debtor or a trustee special powers with respect to liens. Property can be sold "free and clear" of any lien under 11 U.S.C. § 363(f), but the lien then attaches to the proceeds of the sale. Statutory liens can be avoided under section 545, and a trustee has the formidable "preference" powers of section 547(b), which enable the trustee to "avoid any transfer of an interest of the debtor in property . . . [made] on or within 90 days before the date of the filing of the petition. . . ." While the bankruptcy petition in this case came 89 days after the entry of the divorce judgment, neither the trustee nor the debtor invoked the preference provisions to try to avoid the homestead lien. *See* 11 U.S.C. § 547(c)(1), (3) ("new value" exception to preference powers).

SUMMARY OF ARGUMENT

Gerald Sanderfoot and Jeanne Farrey were married for 20 years. They had three children and a home together. They were divorced in 1986 and, within just a few months, Gerald Sanderfoot filed for bankruptcy. When the process finally ended, the federal courts had discharged all of Mr. Sanderfoot's personal debts. He still had the family's homestead under the state homestead exemption, and the financial institution that lent them the money to buy the home in 1979 still had its mortgage, because security interests like mortgages survive even bankruptcy and the homestead exemption.

Jeanne Farrey had nothing. The bankruptcy process protected her former husband, but it deprived her of the "equal" property division promised by the divorce court and any tangible benefit from 20 years of marriage.

Before their divorce, the parties in this case jointly owned their marital property under state law. The state court that divorced them split the property under a state law that presumptively required the marital estate "to be divided equally." The divorce court awarded Mr. Sanderfoot his wife's undivided half interest in the home. It gave her, in return, a few pieces of personal property and a lien on the home to recognize her contribution to the marriage and to ensure that her husband actually paid the money ordered to compensate her for her share of the home and the rest of the marital estate. Mr. Sanderfoot tried to eliminate all of that through the simple expedient of filing for bankruptcy, and the federal district court and the Court of Appeals applied the bankruptcy code and its lien avoidance provision to let him do it.

This case has had devastating consequences for Jeanne Farrey. Its consequences for the federal and state court systems are no less. The courts of appeals are in disarray on the issue: two will permit a debtor to avoid a judicial lien on the family homestead awarded in a divorce to protect the former spouse, and two will not. This Court's decision will determine whether the states retain the ultimate authority to provide for the full, fair and final disposition of property in a divorce. It will determine as well whether the bankruptcy code complements or collides with state law and whether the federal court system, already taxed by an alarming rise in personal bankruptcies, will become the court of last resort for dissatisfied litigants in the state divorce courts.

The Seventh Circuit's majority characterized its own decision as "harsh" but, given the command of section 522(f)(1), inescapable. Yet the statute's "plain language" permits only the opposite conclusion: it does *not*

permit a debtor to avoid a lien awarded a spouse simultaneously with the transfer of a homestead interest on divorce, particularly when the state homestead exemption itself recognizes the lien's validity. Far from being in conflict with the bankruptcy code's text, moreover, the law's legislative history and purpose support it. Congress designed the lien avoidance statute to protect the homestead exemption against creditors who rush to judgment before the property owner files for bankruptcy. Congress did not intend to frustrate the established state interests expressed in the divorce law and the homestead exemption.

ARGUMENT

The exclusive power of Congress to provide "uniform laws on the subjects of bankruptcies" is as old as the Constitution. U.S. Const., art. I, § 8. The pre-eminent authority of the states in matters of domestic relations has a lineage equally established. In this case, these interests converge in the application of a single, deceptively simple provision of the bankruptcy code.

When state divorce courts divide a marital estate, they commonly award one party sole title to the family home and the other party property of commensurate value. If there are few readily divisible assets, however, courts often order the party awarded the homestead to make cash payments to balance the scale, simultaneously imposing a lien on the family's home to secure those payments. That is what happened in this case, and it happens frequently in the 1.2 million divorces granted every year in this country.

Gerald Sanderfoot attempted to nullify the state court's divorce judgment and its "equal" division of property by filing for bankruptcy and invoking section 522(f)(1) to avoid Jeanne Farrey's court-awarded lien against the family's home. This Court will decide whether Mr. Sanderfoot had the statutory right to do that. In the process, it will decide as well whether property divisions in di-

vorce will be ultimately resolved not in the state courts under state law but in the federal courts under federal law.

I. IN AVOIDING THE PETITIONER'S LIEN, THE COURT OF APPEALS MISAPPLIED THE LANGUAGE OF THE BANKRUPTCY CODE IN SECTION 522(f).

The clash between the majority and dissenting opinions in this case reflects the tone and substance of the judicial debate over the lien avoidance statute in all of the circuits that have addressed it. Acknowledging the harsh and inequitable result of its own decision, the Seventh Circuit's majority nevertheless found itself "constrained to apply the law as plainly written." 899 F.2d at 605, App. at 16a. The dissent, using the same analysis and "adhering to the precise contours of the lien-avoidance section," would reach the opposite result. *Id.* at 607, App. at 20a.

Both opinions properly recognized that statutory interpretation "must begin" with the statute's "plain language." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). It should end there in this case with the reversal of the decision of the U.S. Court of Appeals for the Seventh Circuit. The turning point in this case *is* the text of section 522(f)(1). This Court should reverse the Seventh Circuit because the statute's language, read literally or in context with its legislative history, requires that result.

A. The Lien Should Not Be Avoided Because It Did Not Fix On The Debtor's Pre-existing Property Interest.

> "[T]he debtor may avoid the fixing of a lien on an interest of the debtor in property. . . ."

11 U.S.C. § 522(f)(1).

Before their divorce on September 12, 1986, Gerald Sanderfoot and Jeanne Farrey owned their home and land together. Under Wisconsin's marital property law, effective January 1, 1986, each party had a "present undivided one-half interest in each item of marital property." Wis. Stat. § 766.31(3).[6] After their divorce, only Mr. Sanderfoot owned the home and the land, encumbered by a lien imposed simultaneously with the transfer of title by the state court to compensate Ms. Farrey for her property interests in the marriage.

Had the lien been awarded either one day *before* the divorce on Mr. Sanderfoot's undivided half interest or one day *after* the divorce on his title, the lien might be subject to the avoidance statute. In this case, however, three critical events—divorce, the transfer of Ms. Farrey's entire interest to Mr. Sanderfoot, and the court's imposition of the lien to compensate Ms. Farrey—occurred simultaneously in the same bench decision and in the same divorce judgment.

The Seventh Circuit majority misread the statute when it focused on the "fixing of a [judicial] lien" without regard for the complementary phrase "on an interest of the debtor." While the term "fix" has a variety of dictionary definitions, it means in the standard legal sense to "fasten a liability upon one. . . ." *Black's Law Dictionary* 573 (5th ed. 1979). (The word derives from the Latin for "fasten" or "attach.")

By definition, there must be a pre-existing interest to which the lien can fix, fasten or attach itself. The very use of the participle form "fixing" emphasizes that the

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[6] Moreover, the presumption in section 767.255 of the state divorce code that property will be divided equally means the property is "effectively co-owned" before the divorce. *Krueger v. Department of Revenue*, 124 Wis. 2d 453, 460, 369 N.W.2d 691 (1985). The divorce judgment in this case accurately characterized the award as "a division of the property between co-owners . . . ." App. at 58a; *see* Wis. Stat. § 766.75 (marital property retains its character on divorce "except as provided otherwise in a decree . . . ."); § 706.02(1)(f) (conveyance of homestead interest must be signed by both spouses); and, § 861.01 (survivorship rights).

statute applies only to liens that become fixed *after* the debtor acquires the interest.[7] Indeed, were that not the case, the phrase "the fixing of" would be superfluous. Congress simply would have provided that "the debtor may avoid [] a lien on an interest of the debtor. . . ."

The Seventh Circuit's majority found "simply irrelevant" Ms. Farrey's prior undivided half interest in the property and Mr. Sanderfoot's corresponding interest in the same property. 899 F.2d at 602, App. at 10a, *quoting In re Duncan*, 85 B.R. 80, 82 (W.D. Wis. 1988). That was a mistake. Under statutory and common law concepts, Jeanne Farrey had an undivided half interest in the property until the moment of their divorce that cannot be ignored.

The only "interest" of the debtor affected by this lien is his sole title to the homestead, the title awarded him with the divorce by the state court, and not any pre-existing interest he might have had in the homestead as a joint tenant or a tenant in common or under any community property concepts. Any judicial lien that had attached to the undivided half interest he had in the homestead before the divorce would have been subject to the lien avoidance statute. Jeanne Farrey's lien, however, is different. She obtained the lien in return for her joint interest in the property, and Mr. Sanderfoot obtained the property subject to the lien. The lien came with the property interest he received in the divorce judgment, and a debtor can never avoid a lien on an interest

[7] The statutory language "[a]rguably" implies only a "*prospective* avoidance, that is, of a judicial lien not yet fixed; therefore the debtor could not avoid a lien that was existing at the time of the commencement [sic] of the case." Bowman, *Avoidance of Judicial Liens that Impair Exemptions in Bankruptcy: The Workings of 11 U.S.C. § 522(f)(1)*, 68 Am. Bankr. L.J. 375, 385 n.68 (1989) (emphasis in the original); *see* 11 U.S.C. § 545 (avoidance of statutory liens) and 11 U.S.C. § 549 (post-petition liens). This Court need not adopt that position to conclude that the debtor cannot avoid a lien that arises *simultaneously* with the debtor's acquisition of the property.

the debtor acquired subject to the lien. *See supra* at 13.

Section 522(f)(1) permits a debtor to avoid the "fixing of a lien" on the debtor's interest in property, but that "fixing" never happened in this case. The state court created Mr. Sanderfoot's full property interest, by transferring Ms. Farrey's half interest to him, at the same time it created the lien for Ms. Farrey. He acquired the property through the divorce judgment "free and clear" of any claim "except as expressly provided for in this [order]. . . . ," App. at 58, and the order imposed a lien. Jeanne Farrey's lien did not fix to his interest. It was always there.

In *In re Owen*, 877 F.2d 44, *supra* at 12 n.4, the Court of Appeals affirmed a decision preventing the application of 522(f)(1) because the debtor never owned the homestead free and clear of the lien. The creditor in that case obtained a judicial lien, recording it in a Florida county even before the debtor owned property there. When the debtor did buy property there, the lien "fixed" on it. He then filed for bankruptcy and moved to avoid the lien.

The court found the lien not avoidable for two reasons. First, there was no impairment of the debtor's homestead exemption because, under Florida law, the exemption was "specifically subject" to a "lien [that] came into existence prior to the property attaining homestead status." *Id.* at 46-47. Second, "Congress did not intend through section 522(f) . . . to provide a federal exemption greater than that protected by state law where the exemption is created by state law." *Id.*

The purpose of section 522(f), the Eleventh Circuit concluded, was "to protect debtors from the race to judgment often occurring just prior to a debtor filing bankruptcy." *Id.* A section 522(f)(1) judicial lien did not attach to the debtor's property in *Owen* because "[he] never held this property [without] this judicial lien."

Id. The "debtor never owned an unencumbered interest in the real property in question, since the lien attached to the property *simultaneously* with acquisition of the property." *In re Owen*, 86 B.R. 691, 694 (M.D. Fla. 1988) (emphasis added).[8] That is precisely what happened here.

This Court made the same point in an analogous case under the 1898 Bankruptcy Act, *Chicago Board of Trade v. Johnson*, 264 U.S. 1 (1924).[9] The decision permitted a trustee to sell the debtor's seat on a commodities exchange but only after the claims of his creditors had been satisfied. Under the exchange's rules, the creditors could block any sale of the seat until they had been paid, creating in essence a common law lien.

> The lien, if it can be called such, is inherent in the property in its creation, and it can be asserted at any time before actual transfer [of the property]. Indeed, the danger of bankruptcy of the member is perhaps the chief reason, and a legitimate one, for creating the lien.

Id. at 15. While the lien at issue here may well be a judicial lien, it is no less "inherent in the property in its creation." It did not, sometime later, fix on the debtor's interest.

To arrive at its decision, the majority had to assume that Gerald Sanderfoot first acquired sole title to the family's home and, only then, that the lien somehow fixed to it—else there would be no "interest" to which the lien

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[8] The same principle has been applied consistently in cases that do not involve property divisions on divorce. *See, e.g., McCormick v. Mid-State Bank & Trust Co.*, 22 B.R. 997 (W.D. Pa. 1982); *Matter of Stephens*, 15 B.R. 485 (Bankr. W.D. N.C. 1981); *Matter of Hulk*, 8 B.R. 444 (Bankr. D. Conn. 1981).

[9] The case retains its vitality. *See In re Loretto Winery, Ltd.*, 898 F.2d 715, 718 (9th Cir. 1990). In addition, the *Board of Trade* decision has been codified in 11 U.S.C. § 363(f). 124 Cong. Rec. H11089 (daily ed. Sept. 28, 1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 6436, 6463.

attached. 899 F.2d at 601, App. at 8a.[10] Yet never, not even for a moment, did he have sole title to the real estate without the lien that came with sole title. "The lien qualified that interest from the start," Judge Posner wrote. "There was no instant at which Mr. Sanderfoot owned the property free and clear of the wife's interest." 899 F.2d at 607-08, App. at 21a. The lien cannot be avoided because it never fixed to the debtor's property interest.

B. The Lien Should Not Be Avoided Because It Did Not Impair An Exemption To Which The Debtor Otherwise Would Be Entitled.

> "[T]he debtor may avoid the fixing of a lien . . . to the extent that such lien impairs an exemption to which the debtor would have been entitled. . . ."

11 U.S.C. § 522(f)(1).

The debtor chose the state homestead exemption no doubt because, at $40,000.00, it exceeded by more than fivefold the federal homestead exemption in 11 U.S.C. § 522(d)(1). While the Seventh Circuit discussed the application of the state exemption statute to the debtor's homestead, it did so *only* from a financial standpoint. It concluded that Ms. Farrey's lien did, in fact, "impair" at least part of Mr. Sanderfoot's equity in the home, leaving "the bankruptcy court [on remand] to determine in the first instance the value of [the] homestead, and thus the exemption *amount* to which he is entitled." 899 F.2d at 603, App. at 11a (emphasis added). The majority ignored the balance of the section—"to which the debtor would have been entitled"—and, with it, the language of the very state exemption statute chosen by the debtor.

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[10] Indeed, the *Sanderfoot* majority adopted the Ninth Circuit's position: "the state court awarded the homestead to the non-debtor spouse *before* imposing the lien." 899 F.2d at 601, App. at 8a, *citing In re Pederson*, 875 F.2d at 783 (emphasis added). Whatever the facts of *Pederson*, that did not happen here. Even the district court in this case concluded that the parties' "[n]ew interests were *simultaneously* created." 92 B.R. at 803, App. at 24a.

Wisconsin generously has made a family's home "exempt from execution, from the lien of every judgment and from liability for the debts of the owner to the amount of $40,000. . . ." Wis. Stat. § 815.20. However, the statute's exemption itself contains an exception: it does *not* "exempt from execution . . . mortgages, laborers', mechanics' and purchase money liens and taxes . . . ."

A judicial lien, given in a divorce court in Wisconsin, *is* a mortgage. And a mortgage, in Wisconsin, is *not* subject to the homestead exemption even if it has been created by a judicial lien. The state supreme court in *Wozniak v. Wozniak*, 121 Wis. 2d 330, 359 N.W.2d 147 (1984), unequivocally established that principle when it enforced a judicial lien created in a divorce judgment against a surviving joint tenant. Under state law, the "transfer of property as security, regardless of the form thereof, is a mortgage." *Id.* at 336.

In that case, the divorce judgment awarded Opal Wozniak the real estate she had owned in joint tenancy with the parties' grandson. The court simultaneously awarded her spouse a lien on the property "to secure payment to him" of about $8,800.00. When Mrs. Wozniak died, her former husband brought a foreclosure action under the state statute that made the grandson's right of survivorship "subject to" any real estate "mortgage, security interest or statutory lien." Wis. Stat. § 700.24. The supreme court affirmed the foreclosure judgment because, it concluded, the judicial lien awarded in the divorce was, in fact, a mortgage enforceable under section 700.24 and not "merely a judgment lien" that would be extinguished automatically upon the joint tenant's death.

> Even though the term "mortgage" was not used in the divorce judgment, [Mr.] Wozniak was awarded a lien on a specific parcel of real estate as security for the payment of a sum of money, bearing interest at a specific rate, and due at a specific date.

121 Wis. 2d at 338. "The purpose of the instrument is the controlling feature. . . . If that is security, the instrument is treated as a mortgage and nothing else."

Smith v. Pfluger, 126 Wis. 253, 256, 105 N.W. 476 (1905).

The "judicial lien" at issue here has identical characteristics. It was imposed against specific real estate as security for the payment of a specific sum of money due in two specific installments pursuant to the transfer of an interest in that real estate from one spouse to the other on divorce. Like mortgages generally and the *Wozniak* divorce judgment, moreover, Ms. Farrey recorded with the county register of deeds "the portion of the judgment [the lien against the homestead] which affects title to real estate. . . ." Wis. Stat. § 767.255.[11]

The Seventh Circuit's majority discussed the state exemption statute, but it analyzed the *Wozniak* decision only to dismiss the argument that state law could characterize a judicial lien as an "equitable lien" and, accordingly, escape the reach of section 522(f)(1). 899 F.2d at 604 n.17, App. at 14a n.17. Regardless of the merits of that argument,[12] it misses the point. The provisions of state law should be dispositive in this case, not because they create an "equitable lien," but because they define and limit the state exemption that the debtor himself has chosen.

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[11] The spouse who held the lien in *In re Donahue*, 862 F.2d 259, failed to record the decree before the bankruptcy, yet the Court of Appeals still refused to permit the debtor to avoid the lien. *Id.* at 260 n.1.

[12] A number of bankruptcy courts have refused to avoid a lien created in a divorce judgment by calling it an "equitable lien" designed to prevent the unjust enrichment of the debtor spouse who obtains sole title to the property. *See, e.g., In re Borman*, 886 F.2d at 274; *Matter of Bailey*, 20 B.R. at 914. The "equitable lien" in this case would not be subject to the state exemption statute because it qualifies either as a "mortgage" under the *Wozniak* decision or as a "purchase money lien" under the same statute.

Under the 1898 Bankruptcy Act, even before the advent of section 522(f)(1), courts recognized equitable liens created in divorce judgments even though the debt resulting from the property division was dischargeable. *Caldwell v. Armstrong*, 342 F.2d 485 (10th Cir. 1965); *In the Matter of Thumm*, 2 Bankr. Ct. Dec. (CRR) 1347 (Bankr. E.D. Wis. 1976).

Mr. Sanderfoot could not avoid the other secured claims against his bankruptcy estate: the two mortgages listed on the schedule of secured claims. App. at 47a. Even though they clearly "impair" his interest, they fall within the explicit exception in Wis. Stat. § 815.20 for "mortgages, laborers', mechanics' and purchase money liens and taxes. . . ." And, under Wisconsin law, so does Jeanne Farrey's lien.

The debtor cannot elect the benefits of a "State or local law" under 11 U.S.C. § 522(b)(2)(A) and reject the limitations of the same state or local law. *Matter of Allen*, 725 F.2d 290, 292 (5th Cir. 1984), *reh'g denied sub nom. Allen v. Hale County State Bank*, 729 F.2d 1459 (5th Cir. 1984); *In re Pine*, 717 F.2d 281, 284 (6th Cir. 1983), *cert. denied sub nom. Pine v. Credithrift of America*, 466 U.S. 928 (1984). To the contrary, the debtor can avoid a judicial lien *only* "to the extent that the property could have been exempted in the absence of the lien. . . ." H.R. Rep. No. 595 at 362, 1978 U.S. Code Cong. & Ad. News at 6318. Yet the appellate court and the district court disregarded the qualitative limitations imposed by the state homestead law and, on that basis alone under section 522(f)(1), their decisions should be reversed.

Mr. Sanderfoot filed for bankruptcy less than a month after the second installment payment became due. If Ms. Farrey had the opportunity to file a foreclosure action, the procedure approved by the state supreme court in *Wozniak*, Mr. Sanderfoot would not have been able to claim a homestead exemption under Wis. Stat. § 815.20 to defeat the lien. He cannot now use the federal bankruptcy code to avoid Ms. Farrey's lien because, under the state exemption he chose, he was not "entitled" in the first place to exempt the homestead from the mortgage lien imposed by the divorce judgment.

Section 522 protects some of the debtor's property, placing it beyond the reach of creditors, by exempting it from the bankruptcy process. In subsection (f), Congress has protected the exemptions, in turn, by permitting a debtor to avoid specific liens, including a judicial

lien, against exempt property. Gerald Sanderfoot, no less than every other Chapter 7 debtor, should be able to use the statute to protect the exemption on his own property interest. He has no right, however, to protect more than the state law permits him to protect—indeed, no right to try to use federal law to frustrate that state law—at Jeanne Farrey's expense by avoiding her lien.

II. SECTION 522(f)'S HISTORY AND PURPOSE ONLY EMPHASIZE THAT CONGRESS DID NOT INTEND TO UPSET STATE LAW BY PERMITTING A DEBTOR TO DEPRIVE HIS SPOUSE OF BOTH HER HOMESTEAD INTEREST AND HER HOMESTEAD LIEN.

The Seventh Circuit's majority expressed its dismay at the "harsh" result of its decision, finding itself "constrained to apply the law as plainly written." 899 F.2d at 605, App. at 16a. While the result did "place the crown of success on [a] vicious scheme," *id.*, App. at 18a (Posner, J., dissenting), it was neither necessary nor mandated by the statute. To the contrary, this Court should reverse the Seventh Circuit because the statute's text requires it *and* because the statute's context, legislative history and purpose support that text.

A. The Seventh Circuit's Decision Conflicts With The Statute's Purpose And Legislative History.

The majority began its analysis of section 522(f)(1) by acknowledging the disparate results reached by the courts that had interpreted the statute. *Id.* at 600, App. at 5a. It then disregarded its own conclusion and pronounced the language of the statute "clear" and the issue "straightforward." The Seventh Circuit's majority summarily dismissed as "implausible and unsupported by the language of the Code" at least 12 separate decisions by other courts that disagreed with it. *Id.* at 604 & n.14, App. at 13a; *see supra* at 10 n.3; *see also* Appendix.

It is difficult to accept the majority's conclusion that the statute "clearly" permits Gerald Sanderfoot to avoid

the lien when so many courts have reached the opposite conclusion. A statute is ambiguous if it is capable of being construed in different ways by reasonably well-informed people. Indeed, "[t]he fact that a statute has been interpreted differently by different courts has been cited as evidence that the statute is ambiguous and unclear." 2A C. Sands, *Sutherland on Statutory Construction*, § 46.04 (4th ed. 1984).

The majority steadfastly refused to look beyond the statute's "plain meaning" despite all of the decisions adverse to it and despite the "seemingly inequitable results in a divorce setting." 899 F.2d at 605, App. at 15a. Feeling compelled to "give effect to the policy decisions embodied in the express language," *id.*, the Seventh Circuit decided the case without ever penetrating the surface of the statute. It determined the "clear legislative intent" of Congress, *id.* at 16a, without ever taking into account the purpose of the statute stated in its legislative history.

Even were the language as "plain" as the majority has suggested, however, that cannot end the inquiry. An appellate court should set aside the "strict language" where the " 'literal application of a statute will produce a result demonstrably at odds with the intention of the drafters. . . .,' " *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. at 244 (citation omitted), *cited with approval*, 899 F.2d at 600, App. at 6a. Moreover, when a statute's meaning appears superficially clear, but contains ambiguities, a court should look to the legislative history to help construe it. *See United States v. Sec. Indus. Bank*, 459 U.S. 69, 82, n.12 (1982). The Seventh Circuit majority's disregard for those admonitions resulted, in the words of the dissenting judge, in "a perversion of bankruptcy law." 899 F.2d at 606, App. at 18a.

The purpose of section 522(f) "appears unmistakably from legislative history the purpose and significance of which are unquestioned." *Id.* It is to prevent unsecured creditors from obtaining otherwise enforceable judicial

liens as soon as they learn a debtor is about to file for bankruptcy, thereby frustrating the exemptions allowed by the bankruptcy code and state law. The bankruptcy code's *only* legislative history on this point is unequivocal:

> [Section 522(f)(1)] allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists to provide relief for an overburdened debtor. If a creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions.

H.R. Rep. No. 595 at 126-27, 1978 U.S. Code Cong. & Ad. News at 6087-88. Thus, Congress intended to permit a debtor to avoid only those liens "that became fixed *after* the debtor acquired the interest upon which they became fixed." *In re Scott*, 13 B.R. 613, 615 (Bankr. W.D. Okla. 1981) (emphasis in original).

The lien in this case was not created to permit a creditor to defeat a debtor's exemption. The divorce court awarded the lien to secure an obligation the court imposed on the debtor-spouse in an exchange for the court's simultaneous award of his wife's homestead and other property interests to the debtor. The lien did not arise in the context of impending bankruptcy, but during a divorce where the relationship of the parties is not that of debtor and creditor. "This distinction is crucial. It is clear that Congress intended to include within the ambit of § 522(f)(1) only those lien interests created in favor of creditors, not spouses." *In re Thomas*, 32 B.R. 11, 12 (Bankr. D. Or. 1983).

The Seventh Circuit purportedly based its decision on the familiar and accepted principle that it is for Congress, not the courts, to make policy. When Congress has made a decision, the courts must respect its judgment. 899 F.2d at 605, App. at 16a. Yet the Seventh Circuit's majority ignored the stated purpose of Congress when it enacted the statute, achieving a result "that does not promote, but instead denies, simple justice—layman's

justice." *Id.* at 607, App. at 19a-20a (Posner, J., dissenting).

The purpose of section 522(f) is to protect "the debtor's 'fresh start' from the [the] predatory credit practices" of judicial lien creditors. Cross, *The Application of Section 522(f) of the Bankruptcy Code in Cases Involving Multiple Liens*, 6 Bankr. Dev. J. 309, 314 (1989) ("Cross"). Ms. Farrey's lien is not the result of a predatory credit practice, but rather a divorce decree where she surrendered her entire interest in the family's property including its home. *See supra* at 5. Not only does the lien reflect 20 years of marriage to the debtor, it represents her only interest in the marriage's principal asset. In that regard, she resembles a secured creditor far more than anything else:

> The judicial lien creditor can be distinguished from most other secured creditors on purely economic grounds. Most secured creditors acquire their lien as part of a transaction that also provides some economic benefit to the debtor. For example, a purchase-money lender provides funds to the debtor which enable him to buy the collateral in question. . . . Indeed, even the holder of a mechanic's lien has provided a direct benefit to the debtor, i.e., performing repairs or improvements that in most cases increase the value of the property subject to the lien.
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> The judicial lien creditor, however, does not provide any such reciprocal benefit to the debtor when taking her lien. Instead, the creditor acquires the lien merely for the purpose of invoking the power of the state in the collection of her debt. Although this creditor may indeed have provided a "benefit" to the debtor—that benefit is both indirect and far removed.

Cross, 6 Bankr. Dev. J. at 315 n.32.

In this case, Ms. Farrey's interest in the property did not arise—nor was it obtained—through the judgment. She came into court with a pre-existing ownership interest in the property, and the judge exchanged it and other

assets for a lien that recognized her property interests. In contrast, a potential judicial lien creditor walks into court with no interest in any specific property at all but merely a general unsecured debt. The court then creates a lien to allow the creditor to collect the debt. Here, the state court's purpose was to recognize Ms. Farrey's contribution to the marriage and the value of the couple's assets, including her pre-existing interest in those assets, not to create a new charge against the debtor's property.

While no constitutional issues have been raised in this case, the Court always will attempt to apply a statute in a manner that avoids a constitutional question. "No bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted," this Court has held, "in the absence of an explicit command from Congress." *United States v. Sec. Indus. Bank*, 459 U.S. 70 at 81 (refusing to apply section 522(f)(2) retrospectively, avoiding a Fifth Amendment question).

Jeanne Farrey's rights in the marital estate arose with her marriage, long before the enactment of the Bankruptcy Reform Act of 1978. She has lost all of those property rights, however, through the Seventh Circuit's construction of section 522(f). There is no evidence in the code's text or context that Congress explicitly intended to apply the statute "to property rights established before the enactment date." *Id.* This Court can avoid any "'difficult and sensitive questions arising out of the guarantees of the' Takings Clause" by refusing to permit Gerald Sanderfoot to avoid the lien imposed by the state divorce court. *Id., quoting NLRB v. Catholic Bishop of Chicago*, 440 U.S. 590, 597 (1979).

The *Sanderfoot* decision applies the statute in a way that frustrates both the intent of the federal bankruptcy law and the state divorce laws. Ms. Farrey does not ask this Court to amend the bankruptcy code:

> [She is] not asking [the Court] to disregard the purpose of Congress, but to fulfill it by adhering to the precise contours of the lien-avoidance section. She

> is asking [the Court] not to disregard Congress's words, but to apply them. She is asking not for a complex rule or vague standard but for a straightforward distinction between a judicial lien on the bankrupt's property and a judicial lien intended to secure a spouse's preexisting interest in marital property.

899 F.2d at 607 (Posner, J., dissenting), App. at 20.

B. This Court Should Construe The Statute To Reflect The Intent Of Congress And To Accommodate The States' Paramount Interest In Ensuring Fair And Final Property Divisions In Divorce.

The Seventh Circuit has told Jeanne Farrey that she has to stand in line with Mr. Sanderfoot's other unsecured creditors and leave virtually empty-handed. She has been told that her 20-year contribution to the marriage, recognized by the divorce judgment, is "simply irrelevant" because it was "dissolved" by the bankruptcy code. 899 F.2d at 602, App. at 10a. To reach that erroneous conclusion, the majority ignored not only the statute's history and purpose but the bankruptcy code's vital if delicate relationship with state law. The code does not exist in a vacuum. Indeed, it depends on state law to establish the nature of the property interests affected by the bankruptcy process.

Domestic relations "has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). And so has the need to protect families from financial devastation, in or out of bankruptcy, through state statutory exemptions that shield at least some assets from the claims of creditors.[13] The state homestead exemption invoked by Gerald Sanderfoot was enacted in the first session of the state legislature,

[13] The homestead exemption even would have protected Ms. Farrey's lien interest had it not been avoided. Wis. Stat. § 815.20; *see In re Nabbefeld*, 76 B.R. 132 (Bankr. E.D. Wis. 1987). Ironically, the Seventh Circuit's decision allows Mr. Sanderfoot's homestead exemption, through the bankruptcy code, to extinguish the homestead exemption that would have been available to Ms. Farrey.

Wis. R.S. ch. 102, §§ 51-52, 56, 59 (1849), to provide families "with the right to enjoy the comforts of home life free from claims of creditors." Comment, *Homestead Exemption Interests*, 1981 Wis. L. Rev. 697, 705. In *Warsco v. Oshkosh Sav. and Trust Co.*, 190 Wis. 87, 208 N.W. 886 (1926), the Wisconsin Supreme Court described the public policy underlying the exemption statute:

> [I]t is proper [that each citizen] should have a home where his family may be sheltered, and live beyond the reach of financial misfortune and the demands of creditors. . . . [The exemption] is intended to secure to the householder a home for himself and his family. . . . Such protection extends not only to the owner of the homestead, but to his wife and family and it shelters them in the event of financial embarrassment.

Id. at 93; *see also Schwitzke v. American Nat'l Bank*, 242 Wis. 521, 526-27, 8 N.W.2d 303 (1943). The purpose of the exemption is to protect the debtor *and* his family from creditors, not to provide the debtor with a fail-safe device to deny his family the benefits of their property.

The Seventh Circuit felt itself bound by "the clear legislative judgment that debtors may avoid judicial liens of the type at issue . . . ." 899 F.2d at 605, App. at 16a. The Ninth Circuit in *Pederson* was no less deferential: "We are, of course, without authority to second-guess policy judgments made by the political branches of government." 875 F.2d at 784. Whatever might be said about the "plain language" of section 522(f)(1) and its legislative history, they surely do *not* reflect the kind of explicit policy judgment, "positively required by direct enactment," *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904), necessary to upset the states' interests in protecting the family's homestead and the well-being of the entire family in a divorce.

The law of divorce and the law of bankruptcy already share a complex, symbiotic relationship. State divorce laws seek to divide marital assets to reflect the marital partnership and to protect dependent spouses and children.

Federal bankruptcy law seeks to give a bankrupt debtor a fresh start. Generally, when Congress has enacted legislation that affects the common ground between state and federal law, it has not been subtle. Moreover, it has advanced rather than retarded state interests.

The most obvious example is the bankruptcy law's historical reliance on state exemptions and state property interest definitions. The code even permits the states to eliminate the federal exemptions altogether. 11 U.S.C. § 522(b)(1). In addition, the bankruptcy code attempts to blend state and federal objectives by providing in 11 U.S.C. § 523(a)(5) that the child support, alimony and maintenance obligations of a debtor are not dischargeable. Far from providing support for the Seventh Circuit's decision, however, the dischargeability exemption undercuts it.

Section 727 of the bankruptcy code permits the court to discharge the debtor "from all debts . . ." unless the debtor has destroyed or concealed property, refused to cooperate with the court, committed fraud or come within any of the section's other exceptions. Section 523(a)(5) expressly characterizes as non-dischargeable a debtor's liability for child support, maintenance and alimony. That provision has been part of federal bankruptcy law since at least 1903. 32 Stat. 797, 798 (1903). It leads, inescapably if inferentially, to a series of cases concluding that Congress intended a debtor's liability in a division of marital property to remain dischargeable. *See, e.g., In re Schmiel*, 94 B.R. 373 (Bankr. E.D. Pa. 1988); *In re Hoivik*, 79 B.R. 401 (Bankr. W.D. Wis. 1987).

Yet section 523(a)(5) *does not* reflect a Congressional determination that a judicial lien imposed to guarantee a property division is subject to avoidance automatically under section 522(f)(1). The provisions, and the rationale for them, are not the same. Indeed, they reflect the fundamental distinction long made by this Court and bankruptcy law between a dischargeable debt and a lien that survives bankruptcy. *Supra* at 13. For example, a debtor who owes back payments on a car can have

that debt discharged, but the creditor still can repossess the car because the lien remains.

In *In re Donahue*, 110 B.R. 41 (Bankr. D. Kan. 1990), the bankruptcy court on remand applied this principle after the Tenth Circuit had found the homestead lien unavoidable. *Donahue*, 862 F.2d 259. The value of the homestead at bankruptcy was $80,000 with $44,000 still due on the mortgage, leaving the debtor with $36,000 in equity. His former spouse had a claim against the property for $47,948.13, yet the "debt" was enforceable only to the extent of the equity subject to the lien. The balance was dischargeable as an unsecured claim. *Id.* at 45.

The court arrived at this result by applying the bankruptcy code:

> [A]n allowed claim of a creditor secured by a lien on property in which the estate has an interest, . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. . . .

11 U.S.C. § 506(a); *see* 110 B.R. at 43. Section 522(f) and the dischargeability provision are not contradictory. Section 523(a)(5) addresses the dischargeability of an unsecured property division. Section 522(f) involves another issue entirely—the debtor's ability to avoid a lien.

While a debtor's property division obligation may well be dischargeable, that determination must be made by the court subject to the exceptions of 11 U.S.C. § 727(a). A debtor cannot discharge the debt unilaterally. Under the Seventh Circuit's construction of the lien avoidance statute, by contrast, a judicial lien designed to ensure an "equal" distribution of property can be avoided by the debtor—regardless of fraud or any other objections and subject only to the court's determination that section 522(f)(1) embraces the "judicial lien" at issue.

There is not the slightest evidence that Congress intended, by enacting the lien avoidance statute, to give a secured property division in a divorce even less protection in bankruptcy than an unsecured property division. Yet that is the unavoidable effect of the Seventh Circuit's majority opinion. By allowing the debtor to avoid unilaterally a lien awarded his former wife in their divorce judgment, this decision has upset a balance explicitly struck by Congress and the states—without justification from the facts of the case or the law applied to those facts.

C. The Seventh Circuit's Construction Of The Statute Ignored Its Dire Consequences For The State And Federal Courts.

The final disposition of this case will determine whether Jeanne Farrey ever will receive the equal distribution of property ordered by the state court or whether she will receive virtually nothing. If the Court of Appeals' decision stands, however, it will have a devastating impact on far more than Jeanne Farrey.

In 1988, the state courts of this country granted almost 1.2 million divorces. U.S. Department of Commerce, *Statistical Abstract of the United States* 89 (1990). Although the annual rates of divorce vary, half of all marriages end in divorce. All of these divorces, whether they involve the rich or the poor, inevitably divide the parties' property. For almost 65 percent of the households in this country, that property includes equity in their own home. U.S. Department of Commerce, Current Housing Report H-150-85, American Housing Survey for 1985, p. 1 (1988).

The divorce courts award liens because they are a well-established, practical and effective tool for dividing marital property. Courts use the lien to secure the lienholder's pre-divorce interest until the home eventually can be sold and to carry out an equitable division of assets when the spouse awarded sole title to the homestead does not have enough ready cash to pay the spouse who must

leave it. To the parties and to the state courts mandated by law to make equitable property distributions on divorce, the status of those liens is not an abstract legal question.

A property division theoretically "equal" at the time of the divorce may become grossly inequitable just weeks, or even moments, later if the debtor-spouse can avoid the lien by filing for bankruptcy. That is precisely what has happened to Jeanne Farrey as a result of the majority decision, and it is not an isolated occurrence. *See* Appendix. Without the ability to award a non-avoidable lien, divorce courts now will have few practical alternatives for ensuring that a marital estate will be distributed equitably.

A state court could order the homestead immediately sold with the proceeds divided appropriately. Yet that would result, needlessly in many cases, in forcing children from their family home—regardless of the family's financial status or which parent has custody. It would destroy, moreover, the very rationale for a homestead exemption. *See supra* at 32-33. In theory, a court alternatively could order the title to the homestead held jointly by both spouses, but that would deprive the spouse who left the homestead of the liquid assets necessary to establish a new home. It also would leave the home's maintenance and control divided between two people who had terminated their partnership.

Finally, a divorce court could order the debtor-spouse to execute a mortgage but, as the Seventh Circuit's majority itself recognized, that probably would not meet the bankruptcy code's definition in 11 U.S.C. § 101(45) of a "security interest." 899 F.2d at 604 n.17, App. at 14a n.17. The lien would remain avoidable. *Id.* at 15a. If, on the other hand, the "harsh" result in this case could be avoided simply by a court ordering a party to execute a mortgage, rather than imposing a judicial lien, then form would triumph over substance for no purpose under either state or federal law.

The Seventh Circuit's majority expressed its concern about the "havoc" that would ensue if state divorce law were permitted to vary federal bankruptcy law. 899 F.2d at 605, App. at 15a. While federalism always has that potential, the risk of havoc runs the other way in this case. The bankruptcy code already may have become a standard business planning device. *See id.* at 606 (Posner, J., dissenting), App. at 18a. Absent a clear Congressional mandate, however, it should not also become an integral part of the divorce law of the 50 states. The state court systems already provide for appellate review of domestic relations cases. Under the Seventh Circuit's majority decision, there will be another avenue of "appeal" and another forum for relief—the federal courts.[14]

Statutory construction can occur in neither a substantive nor a practical vacuum. Under the construction at issue here, disgruntled litigants can turn to the bankruptcy code and the federal courts to defy state divorce law, threatening the financial well-being of every spouse awarded a lien by a divorce court to secure his or her share of the marital estate and threatening the integrity of the court system itself. To nullify a divorce judgment and to escape financial responsibility, the party awarded the family homestead need only file a petition for bankruptcy to avoid, unilaterally and automatically, the homestead lien awarded to the party's spouse in the same judgment. Congress could not have intended that result, with its staggering implications for the state and federal courts, and the Seventh Circuit's majority did not consider those implications when it permitted Gerald Sanderfoot to avoid the homestead lien awarded his wife on their divorce.

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[14] The number of personal bankruptcy filings has risen 14 percent in the last year. The current fiscal year budget for the federal courts now exceeds $2 billion—"fueled by drug cases and an ever-rising tide of personal bankruptcies . . . ." Report of the Chief Justice, Dec. 31, 1990.

CONCLUSION

The bankruptcy code protects the interests of debtors without depriving creditors of their security. The homestead exemption protects a family's home. Ironically, Gerald Sanderfoot used the bankruptcy code and, through it, the state's homestead exemption to eliminate Jeanne Farrey's secured interest in the family home. The Seventh Circuit's majority has interpreted the code in a way that Congress never intended and the states never expected: as a "tool by which bounders defraud their spouses." 899 F.2d at 607 (Posner, J., dissenting), App. at 20a. Mr. Sanderfoot has been allowed the fresh start intended by the bankruptcy code not only with his own property intact but with Ms. Farrey's property as well.

The decision of the U.S. Court of Appeals for the Seventh Circuit was wrong. This Court should reverse that judgment and the judgment of the U.S. District Court for the Eastern District of Wisconsin. It should leave intact the bankruptcy court's judgment and, with it, the lien granted Jeanne Farrey against her family's homestead property—her only tangible asset from 20 years of marriage.

Respectfully submitted,

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Dated: January 10, 1991

APPENDIX

APPENDIX

-REFUSING TO AVOID THE LIEN:

In re Borman, 886 F.2d 273 (10th Cir. 1989) (equitable lien imposed where homestead property intended to be source from which husband's divorce decree debt would be paid to wife; permitting debtor to discharge debt would result in unjust enrichment), *rev'g*, unpublished opinion of U.S. District Court for the District of Kansas, *aff'g*, U.S. Bankruptcy Court for the District of Kansas.

In re Donahue, 862 F.2d 25^ (10th Cir. 1988) (divorce decree, which awarded debtor's former spouse a money judgment and awarded debtor real property subject to the judgment, an equitable lien or mortgage in former spouse's favor), *rev'g*, 62 B.R. 607 (D. Kan. 1986).

Boyd v. Robinson, 741 F.2d 1112 (8th Cir. 1984) (former husband's lien acquired during marriage dissolution proceeding on parties' homestead not a lien attaching to "an interest of the debtor in property"), *aff'g*, 31 B.R. 591 (D. Minn. 1983), *rev'g*, 26 B.R. 772 (Bankr. D. Minn. 1982).

In re Rittenhouse, 103 B.R. 250 (D. Kan. 1989) (lien divorce court granted debtor's former spouse at same time it awarded spouse's one-half interest in property to debtor not avoidable as judicial lien because it did not attach to debtor's interest in property).

Zachary v. Zachary, 99 B.R. 916 (S.D. Ind. 1989) (lien granted debtor's former wife in divorce decree not avoidable because it merely transformed wife's interest from owner of one-half interest to that of lien holder).

In re Stone, 119 B.R. 222 (Bankr. E.D. Wash. 1990) (liens granted in divorce decrees equivalent to vendor's liens against which Washington homestead exemption not available; *In re Pederson*, 875 F.2d 781 (9th Cir. 1989), criticized for disposing of the "pre-existing interest" ar-

gument even though wife did not have an interest in the property prior to time lien granted).

In the matter of Holtzhauser, 117 B.R. 519 (Bankr. D. Neb. 1990) (lien of former spouse on debtor's residence under divorce decree not avoidable under *Boyd v. Robinson*, 741 F.2d 1112).

In re McCormmach, 111 B.R. 330 (Bankr. D. Or. 1990) (mortgage executed by debtor pursuant to terms of stipulated dissolution decree not avoidable as judicial lien impairing debtor's homestead exemption).

In re Worth, 100 B.R. 834 (Bankr. N.D. Tex. 1989) (lien from divorce court to debtor's former spouse, awarded at same time debtor received one-half interest in homestead, not impairing any exemptions to which debtor entitled under Texas law).

In re Dunn, 109 B.R. 865 (Bankr. N.D. Ind. 1988) (lien granted by debtor to former spouse in property agreement incorporated into divorce decree more a "consensual lien" than a "judicial lien" and, therefore, not avoidable).

In re Conway, 93 B.R. 731 (Bankr. N.D. Okla. 1988) (lien on homestead property granted debtor's spouse by divorce decree not a judgment lien avoidable by debtor because lien in existence when debtor received title to property).

In re Boyd, 93 B.R. 538 (Bankr. S.D. Tex. 1988) (lien awarded in a divorce decree an implied but valid vendor's lien on homestead).

In re Warren, 91 B.R. 930 (Bankr. D. Or. 1988) (lien given husband in marital home on divorce not a judicial lien avoidable by former wife, following logic of *Boyd v. Robinson*, 741 F.2d 1112).

In re Shands, 57 B.R. 49 (Bankr. D. S.C. 1985) (former wife's lien on debtor's residence, imposed pursuant to property settlement agreement incorporated into divorce decree, a security interest not a judicial lien and not avoidable).

In re Hart, 50 B.R. 956 (Bankr. D. Nev. 1985) (holding an equitable lien, created by quit claim transfer of former husband's interest to debtor pursuant to divorce decree to secure payment of husband's equity interest in home, a purchase money obligation rather than judicial lien and not avoidable).

In re Chesnut, 50 B.R. 309 (Bankr. W.D. Okla. 1985) (lien to former spouse represents a division of family property, and property's conveyance subject to the lien to secure payment of other spouse's share of the property settlement not subject to section 522(f)).

In re Butts, 46 B.R. 292 (Bankr. D. N.D. 1985) (constructive trust imposed where wife conveyed interest in marital home during divorce wth expectation of receiving in exchange $35,000 and husband filed bankruptcy claiming entire homestead as exempt intending to take entire proceeds of home sale).

In re Seablom, 45 B.R. 445 (Bankr. D. N.D. 1984) (holding a lien created by divorce decree to protect former wife's compensation for her interest in jointly-owned realty did not attach to an interest of the estate but protected a pre-existing property interest).

In re Williams, 38 B.R. 224 (Bankr. N.D. Okla. 1984) (finding that divorced wife's judicial lien on husband's property, imposed to secure lump-sum property settlement awarded to wife, arose contemporaneously with conveyance of property to husband and judicial lien could not be avoided).

In re Thomas, 32 B.R. 11 (Bankr. D. Or. 1983) (document that conveys one spouse's homestead interest to other spouse simultaneously creates a lien in favor of spouse who leaves residence; property conveyed subject

to lien that never fixed on an interest of debtor in the property).

In re Graham, 28 B.R. 928 (Bankr. N.D. Iowa 1983) (lien on debtor's homestead property held by debtor's former wife not avoidable because it created constructive trust for wife to the extent of assets used in purchasing homestead).

In re Adams, 29 B.R. 452 (Bankr. N.D. Iowa 1982) (holding that judicial lien granted pursuant to divorce decree renders otherwise exempt homestead property not exempt to the value of the lien under Iowa law).

Wicks v. Wicks, 26 B.R. 769 (Bankr. D. Minn. 1982) (finding former husband's lien against debtor's homestead, which arose from stipulated agreement incorporated into divorce judgment, a security interest that could not be avoided).

In re Erwin, 25 B.R. 363 (Bankr. D. Minn. 1982) (holding that decree conveyed former spouse's interest to debtor subject to lien and constitutes an equitable mortgage entitled to same treatment as purchase money mortgage).

Matter of Bailey, 20 B.R. 906 (Bankr. W.D. Wis. 1982) (holding that divorce judgment creates an equitable lien on debtor's homestead, not avoidable under section 522(f)).

In re Scott, 12 B.R. 613 (Bankr. W.D. Okla. 1981) (lien not fixed on an interest of debtor in the property where lien created by same document that conveyed interest in the homestead property to spouse).

AVOIDING THE LIEN:

In re Sanderfoot, 899 F.2d 598 (7th Cir. 1990) (former spouse's lien on marital home, granted pursuant to divorce decree, avoidable as impairing debtor's homestead exemption), *aff'g*, 92 B.R. 802 (E.D. Wis. 1988), *rev'g*, 83 B.R. 564 (Bankr. E.D Wis. 1988).

In re Pederson, 875 F.2d 781 (9th Cir. 1989) (lien granted debtor's former wife in divorce action a judicial lien subject to avoidance), *aff'g*, 78 B.R. 264 (Bankr. 9th Cir. 1987), *rev'g*, No. 86-05147-Y7 (Bankr. W.D. Wash. Sept. 25, 1986).

Maus v. Maus, 837 F.2d 935 (10th Cir. 1988) (lien created by divorce decree an avoidable judicial lien if property settlement agreement incorporated in divorce specifically made grant of homestead property free and clear of claims of husband), *aff'g*, unpublished opinion of U.S. District Court for District of Kansas, *rev'g*, 48 B.R. 948 (Bankr. D. Kan. 1985).

In re Stebbins by and through Dahl, 105 B.R. 118 (S.D. Fla. 1989) (lien on exempt property that represents nondischargeable judgment for alimony, support or maintenance not avoidable but judgment of property settlement avoidable).

In re Duncan, 85 B.R. 80 (W.D. Wis. 1988) (judicial lien granted on exempt property in divorce judgment to secure payment of property settlement avoidable).

In re Godfrey, 102 B.R. 769 (Bankr. 9th Cir. 1989) (lien arising from divorce decree avoidable as judicial lien under *In re Pederson*, 875 F.2d 781).

In re Brewer, 117 B.R. 712 (Bankr. M.D. Fla. 1990) (lien in favor of debtor's former spouse created by entry of judgment a judicial lien subject to avoidance to extent lien impaired homestead exemption).

In re Showinsky, 117 B.R. 284 (Bankr. W.D. Mich. 1990) (lien granted debtor's ex-wife in marital home a judicial lien notwithstanding uncontested divorce that merely incorporated terms of the settlement between the parties).

In re Porter, 112 B.R. 979 (Bankr. D. Mo. 1990) (lien arising from divorce judgment a judicial lien impairing debtor's homestead exemption and avoidable).

In re Boggess, 105 B.R. 470 (Bankr. S.D. Ill. 1989) (former spouse's lien awarded in divorce decree against homestead a judicial lien avoidable under section 522(f)(1)).

In re Brothers, 100 B.R. 565 (Bankr. N.D. Ala. 1989) (former spouse's lien on homestead, awarded pursuant to divorce decree, a judicial lien subject to avoidance).

In re Alvarado, 92 B.R. 923 (Bankr. D. Kan. 1988) (judicial lien on debtor's homestead, granted by divorce decree, attached to debtor's interest in property rather than to pre-existing interest of former spouse and therefore avoidable, a decision required by *Maus v. Maus*, 837 F.2d 935).

In re Coffman, 52 B.R. 667 (Bankr. D. Md. 1985) (lien granted debtor's husband pursuant to divorce decree avoidable because it was for dischargeable property division).

In re Grimes, 46 B.R. 84 (Bankr. D. Md. 1985) (lien securing debt in nature of property settlement, rather than alimony, maintenance or support avoidable).

Matter of Maness, 17 B.R. 76 (Bankr. W.D. Mo. 1981) (judicial lien held by debtor's former wife arising out of dissolution decree avoidable if debtor complied with dissolution decree including payment of one-half of equity in the property).

No. 90-350

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

IN RE GERALD J. SANDERFOOT, DEBTOR.

JEANNE FARREY, f/k/a JEANNE SANDERFOOT,
Petitioner,

v.

GERALD J. SANDERFOOT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The state divorce court gave Jeanne Farrey a lien on the home that she and Gerald Sanderfoot owned, together, during their long marriage. Under the federal bankruptcy code, Mr. Sanderfoot not only discharged all of the debts the state court ordered him to pay, he avoided Ms. Farrey's homestead lien as well. Congress has made a number of the code's provisions explicitly dependent on state law, including the state homestead exemption through 11 U.S.C. § 522. Yet the decision of the U.S. Court of Appeals for the Seventh Circuit has permitted

Mr. Sanderfoot to use the bankruptcy code to frustrate state law and to eliminate, along with his personal debts, his wife's own property interest in the family home and the equal property division required by the divorce judgment. This Court should reverse that decision.

I. NEITHER STATE NOR FEDERAL LAW PERMITS THE RESPONDENT TO USE JEANNE FARREY'S PROPERTY TO MAKE HIS "FRESH START."

In the divorce judgment, Mr. Sanderfoot received the family's home and most of the family's assets. He "was also 'awarded' in excess of $78,000.00 of debt with Ms. Farrey being 'awarded' $999.10 of debt." Brief for the Respondent ("Resp. Br."), p. 3. That disproportionate assignment of liabilities dramatically reduced Ms. Farrey's share of the net marital estate, to just over $29,000.00, but the judgment in fact reflected an equal property division when the parties divorced. She had as well the "security" of the homestead lien in the divorce judgment.

The bankruptcy court eventually discharged all of Mr. Sanderfoot's personal debts, without controversy, giving him the "fresh start" promised by the code. He got far more, however, than just that. When the federal district court and the U.S. Court of Appeals permitted Gerald Sanderfoot to avoid the lien, they gave him a windfall: Jeanne Farrey's interest in the family's homestead debt-free. The divorce left her with an "equal" share of an estate reduced to account for the debts assigned to her husband, and the bankruptcy left her without any interest in the home she helped build and maintain.

A. The "Fixing of a Lien," Required By The Statute, Never Occurred Because The Transfer Of Title And The Imposition Of The Lien Were Simultaneous.

The respondent's argument is straightforward. First, the parties had "title to the real estate in joint tenancy, each holding a pre-existing undivided one-half interest"

in the property. Resp. Br. at 7-8. Then, Mr. Sanderfoot maintains, the divorce court "wholly extinguished" those rights, next awarding him sole title to the home. Then, and only then, did the divorce court "finally" award Ms. Farrey "an amount of money to balance the property division to be secured by a lien on *Mr. Sanderfoot's* real estate." *Id.* at 11 (emphasis in the original); *see id.* at 9. However linear the argument, it rests on a fiction.

There was only *one* divorce judgment. The court did not enter one order awarding Mr. Sanderfoot the real estate and, "finally," a separate order awarding Ms. Farrey a lien on the property. To the contrary, in the words of the federal district court, the judgment "simultaneously created" new interests: the lien for Ms. Farrey, the title for Mr. Sanderfoot encumbered by the lien. *In Re Sanderfoot*, 92 B.R. 802, 803 (E.D. Wis. 1988), Appendix, Petition for a Writ of Certiorari ("App."), p. 24a. And, in the words of the divorce judgment, each party forfeited all "right, title and interest" in the property transferred to the other party "except as expressly provided . . ." in the judgment itself. App. at 58a. Ms. Farrey's lien does indeed encumber Mr. Sanderfoot's property interest, Resp. Br. at 5, but that only presents the question without answering it.

Section 522(f)(1) permits a debtor to "avoid the *fixing* of a lien on an interest of the debtor in property. . . ." (Emphasis added.)[1] A debtor cannot ignore the lien "fixing" requirement to avoid encumbrances already in place when the debtor acquired the property. No court would permit a debtor who purchased a home subject to a mortgage to invoke the bankruptcy code in an attempt to avoid that "fixed" lien. Valid liens survive bankruptcy. *See Watkins v. Watkins*, 922 F.2d 1513, 1515 (10th Cir.

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[1] The respondent repeatedly uses the term "fixed," *e.g.*, Resp. Br. at 7, 9, but "fixing" not "fixed" is the statute's dispositive term.

1991). Yet that is precisely the result Gerald Sanderfoot has asked this Court to endorse.

For all of the respondent's emphasis on the "new rights" in the divorce judgment, *e.g.*, Resp. Br. at 5, 8, the divorce judgment neither created nor extinguished Jeanne Farrey's property interest. Under Wisconsin law, she had a pre-existing ownership interest in the family's homestead and all of its other assets regardless of how the parties held title. The divorce judgment only transformed that interest, when it divided the marital estate in half, giving her a specific financial obligation secured by a lien on the homestead "in place of her pre-existing rights." *Id.* at 8. While the form changed, the parties' co-ownership of the marital estate did not.

This case does not involve "the actions of creditors that bring legal action against the debtor shortly before bankruptcy . . ." to turn a commercial debt into a judgment lien. H.R. Rep. No. 595, 95th Cong., 1st Sess. 126-27 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 6087-88.[2] Rather, the state divorce court divided the marital estate, co-owned by the parties and defined by state law, in a single judgment. The simultaneous exchange of the homestead property for the lien in one document "fails to meet the requirement of section 522(f)(1) that [the lien] fix on the debtor's interest in the property." Note, *A "Fresh Start" With Someone Else's Property? Lien Avoidance, The Homestead Exemption, and Divorce Property Divisions Under Section 522(f)(1) of the Bankruptcy Code*, 59 Fordham L. Rev. 301, 317 (1990) (forthcoming).

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[2] Section 67a of the Bankruptcy Act, 11 U.S.C. § 107(a)(1) (1976), had a four-month lien avoidance deadline. The respondent has not noted a single pre-code decision, however, that permitted a debtor to avoid a divorce lien. When Congress replaced the entire Act in 1978, moreover, it effectively replaced that deadline with the "fixing" requirement of section 522(f)(1) and with the comprehensive preference provisions of 11 U.S.C. § 547.

B. The Bankruptcy Code Depends On State Law To Define The Homestead Exemption, And The Respondent Cannot Use It Against His Spouse.

There is no doubt that federal bankruptcy law generally supersedes state law. *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369 (1945). But that same federal bankruptcy law has incorporated state exemptions, explicitly permitting a debtor to rely on them, since at least the Bankruptcy Act of 1898. 30 Stat. 544, 548. Because some state exemptions offered debtors little, Congress in 1978 created federal exemptions, permitting debtors to choose either the state or the federal exemptions. 11 U.S.C. § 522(b)(1). Under the new law, however, the states retained their exclusive control over bankruptcy exemptions because Congress gave the states the exclusive right to define their own exemptions and to deny their residents the ability to use the federal exemptions. *Id.*

Notwithstanding this pre-eminent role conferred by Congress on the states, the respondent repeatedly maintains that "federal law will determine avoidability of the lien . . . rather than state law." Resp. Br. at 16.[3] Indeed, he contends that the state exemption only "determine[s] *what* property is exempt (i.e. the definition of homestead) . . ." *id.* (emphasis in the original), but nothing else. The debtor wants the benefit of Wisconsin's $40,000.00 homestead exemption without the exemption's own limitations—particularly, the specific provision of Wis. Stat. § 815.20 that exempts from execution "the lien of every judgment . . . *except* mortgages. . . ." (Emphasis added.)

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[3] The respondent's reliance on *In re Heape*, 886 F.2d 280, 282 (10th Cir. 1989), for this sweeping proposition is misplaced. That case involved the "tools of the trade" provision of section 522(f)(2). Moreover, the Seventh Circuit has held that state, not federal, law defines "tools of the trade" when the debtor has elected the state exemption. *In re Thompson*, 867 F.2d 416, 421 (7th Cir. 1989).

There is not the slightest evidence that Congress intended to deny states the power to define their own homestead exemptions. To the contrary, the bankruptcy code always has depended on state law to define the property interests at stake in a bankruptcy. *See, e.g., Grogan v. Garner*, —— U.S. ——, ——, 111 S.Ct. 654, 657 & n.9 (1991); *Butner v. United States*, 440 U.S. 48, 55 (1979). The 1978 reform act not only continued to rely on state exemptions but expanded the power of the states—even to the point of permitting states to deny the federal exemptions to their own residents.[4]

The respondent's emphasis on the fleeting comments in section 522(f)(1)'s legislative history, Resp. Br. at 19-20, 22, reinforces that very point: "The debtor may avoid a judicial lien on any property to the extent that the property could have been exempted in the absence of the lien" under state law. S. Rep. No. 989, 95th Cong., 2d Sess. 77 (1978), *reprinted in* U.S. Code Cong. & Ad. News 5787, 5862.

The bankruptcy code's explicit reliance on the state homestead exemption cannot be divorced from the state's own public policy, expressed in both the exemption and the divorce law. *See Warsco v. Oshkosh Sav. and Trust Co.*, 190 Wis. 87, 208 N.W. 886 (1926). That law "presumes an equal division of marital estate[s] . . . ." Resp. Br. at 3 n.2. To that end, the state even gives homestead status to a spouse's security interest in the family home. *See In re Nabbefeld*, 76 B.R. 132 (Bankr. E.D. Wis. 1987). Yet the respondent would have the Court ignore "how Wisconsin may treat the lien," Resp. Br. at 5, myopically focusing only on section 522(f).

[4] Section 522(f) was designed to ensure that the *state* exemptions remained effective, permitting the debtor to avoid a lien that impaired those state exemptions. It is inconsistent, at best, to suggest that the same federal law somehow precludes the states from defining and limiting their own exemptions. *See Matter of Allen*, 725 F.2d 290, *reh'g denied sub nom. Allen v. Hale Co. State Bank*, 729 F.2d 1459 (5th Cir. 1984).

Gerald Sanderfoot had a choice. He could have elected the $7,500.00 federal homestead exemption in 11 U.S.C. § 522(d) without any limitations. Instead, he chose the far more generous state exemption, but he cannot now escape the explicit limitations of that exemption. Under Wisconsin law, the lien imposed by the divorce judgment is a mortgage, *Wozniak v. Wozniak*, 121 Wis. 2d 330, 359 N.W.2d 147 (1984), and the homestead exemption statute has an explicit exception for the mortgage awarded Ms. Farrey by the divorce court.

Section 522(f)(1) permits a debtor to avoid a lien on homestead property only "to the extent that such lien impairs an exemption to which the debtor would have been entitled . . ." under state law. Mr. Sanderfoot was not entitled to use his homestead exemption to defeat Ms. Farrey's lien under state law, and he can fare no better under section 522(f).

II. THERE IS NO EVIDENCE THAT CONGRESS DESIGNED THE LIEN AVOIDANCE STATUTE TO DISPLACE STATE DIVORCE LAW.

While the result in this case "may be harsh," the respondent concedes, the bankruptcy code is replete with draconian provisions. Resp. Br. at 25. When Congress has, by law, permitted or dictated a "harsh" result in bankruptcy, however, it has done so clearly, explicitly, and directly. Congress has been particularly forthright—consistent with the decisions of this Court—when it adopts legislation that affects domestic relations, "a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *see Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979). There is nothing clear, explicit or direct about section 522(f), however, if the statute really means what the Seventh Circuit said it means.

Congress "recognized" the "convergence of state domestic relations law and bankruptcy law," the respondent notes, when it provided in 11 U.S.C. § 523(a)(5) that

maintenance and child support payments are not dischargeable and in section 522(c) that even exempt property can satisfy those domestic obligations. Resp. Br. at 25; *see id.* at 22. That is precisely the point. Congress has *not* been subtle with the bankruptcy code when it affects domestic relations. *See, e.g.*, 11 U.S.C. §§ 362(b)(2), 363(g)-(i), 524(a)(3) and (b), 541(a)(2) and (5)(B), 726(c). Yet the respondent contends that Congress, somehow by inference, has silently mandated a catastrophic change in state divorce law by permitting a debtor to avoid a homestead lien that secures an equal property division judgment.[5] Neither the statute's language nor its context and history support that conclusion.

Both parties in this case claim the high ground of statutory interpretation: the text. The Seventh Circuit's application of the law to Gerald Sanderfoot's bankruptcy leaves Jeanne Farrey with nothing after 20 years of marriage. Even were that the inevitable result of the "plain meaning" of the statute, it is a result that Congress could not have imagined, let alone desired, when it revised the bankruptcy code. *See Demarest v. Manspeaker*, —— U.S. ——, ——, 111 S.Ct. 599, 604 (1991); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring). There is not a "shred of evidence," in the meager legislative history of section 522(f)(1), that anyone "ever proposed or assumed such a bizarre disposition." *Id.*

To determine the meaning of the lien avoidance statute, the Court will analyze not only the text but "the design of the statute as a whole and [] its object and policy." *Crandon v. United States*, —— U.S. ——, ——, 110 S.Ct. 997, 1001 (1990). In a familiar refrain, the respondent contends that had "Congress intended liens

[5] If the Seventh Circuit is correct, Congress with section 522(f)(1) substantially increased the workload of the federal judiciary, provided another forum for divorce litigants, and thrust federal policy into the state system—all by implication.

for property division payments in contested divorces to be treated differently from other judicial liens, it would have so stated in clear terms." Resp. Br. at 24. That misplaces the burden of statutory interpretation. Had Congress intended section 522(f)(1) to permit a debtor-spouse to escape the consequences of a divorce judgment and take his wife's property, it would have so stated in clear terms. *See Grogan v. Garner*, —— U.S. at ——, 111 S.Ct. at 659. And Congress most certainly did not say that.

Under section 523(a)(5), a debtor cannot discharge court-ordered child support and maintenance obligations. A debtor can, however, discharge a debt attributable to a property award in a divorce. Gerald Sanderfoot's personal obligation to pay Jeanne Farrey $29,208.44 may have been dischargeable but, as the respondent concedes, that is *not* the issue. Resp. Br. at 23. The issue is the status of her secured property interest: the homestead lien imposed by the divorce judgment. If it is avoidable, Jeanne Farrey will receive the same bankruptcy dividend that all of Mr. Sanderfoot's creditors received: nothing. If the lien is valid, she can enforce it to the value of the property, finally obtaining at least part of the "complete and equitable" property division promised by the divorce court. App. at 58a.

The dischargeability provisions of the code, according to the respondent, "clearly" demonstrate "that Congress did not intend to treat contested property division judgment liens different from any other judgment lien." Resp. Br. at 6. That argument, like the opinion of the Seventh Circuit, misperceives the fundamental distinction between debt and security for debt. While the debt can be discharged, the security always remains. While Gerald Sanderfoot personally may no longer owe his former wife a cent, as a result of the bankruptcy process, she retains her security in the family's home—just like the other parties who hold mortgages of record on the property. *See id.* at 10 n.4.

Ms. Farrey asks only that the bankruptcy code be applied, as written and intended, with logical results. The lien will be enforceable only to the value of the equity in the property, and any remaining debt would be discharged. *In re Donahue*, 110 B.R. 41 (Bankr. D. Kan. 1990). That respects all of the policies at issue here: the "fresh start," the states' pre-eminence in matters of family law and, through the bankruptcy code itself, the states' exclusive right to define exemptions.

Virtually every state provides for an equal or virtually equal property division on divorce. State courts often emphasize the need for divorcing spouses to reduce their reliance on alimony or maintenance and to increase their job skills and self-reliance. Ironically, the Seventh Circuit's decision eviscerates both policies. It permits debtors to ignore the decisions of the state divorce courts, and it encourages even more extensive dependence on monthly payments from a former spouse—payments not dischargeable under the bankruptcy code.

The "broad discretion" of the state divorce courts emphasized by the respondent, Resp. Br. at 25, rings hollow when a Chapter 7 bankruptcy filing can render a divorce judgment neither full nor fair nor final. Where are the "remedies which will protect all of the parties to a divorce . . ." if the Seventh Circuit's decision stands? *Id.* at 26. This Court will not find them in the respondent's brief, nor will the state divorce courts find those remedies anywhere else. There are none.

> When applied to divorce decree liens on marital homestead property, the right of debtors to avoid liens under section 522(f)(1) . . . upsets the complex interrelationship between federal bankruptcy law and state divorce law. . . . If court judgments enforcing property divisions in contested divorces can be nullified by section 522(f)(1), divorce courts will be severely handicapped in implementing the mandates of state divorce statutes.

> The debtor's fresh start is already protected. . . . To achieve a more proper balance between federal and state interests in the bankruptcy-divorce setting and to ensure more equitable protection of the fresh start goals of both debtor and ex-spouse, debtors should not be permitted to use federal bankruptcy law to avoid divorce decree homestead liens.

Note, 59 Fordham L. Rev. at 330 (forthcoming).

Earlier this year, this Court acknowledged the importance of the "fresh start" concept in the bankruptcy code. It limited the opportunity for a "completely unencumbered new beginning," however, to the " 'honest but unfortunate debtor.' " *Grogan v. Garner*, —— U.S. at ——, 111 S.Ct. at 659, quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). The cause of Gerald Sanderfoot's financial difficulty is not at issue here. He may well deserve a "fresh start," but not with his former wife's property, her only remaining asset from 20 years of marriage.

CONCLUSION

For the reasons stated above and in the petitioner's initial brief, this Court should reverse the judgment and decision of the U.S. Court of Appeals for the Seventh Circuit and reinstate the judgment of the bankruptcy court that properly refused to permit Gerald Sanderfoot to avoid Jeanne Farrey's homestead lien.

Dated: March 18, 1991.

Respectfully submitted,

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In The
Supreme Court of the United States
October Term, 1990

IN RE GERALD J. SANDERFOOT, DEBTOR.
JEANNE FARREY, f/k/a JEANNE SANDERFOOT,
Petitioner,

v.

GERALD J. SANDERFOOT,
Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a debtor may, pursuant to 11 USC Section 522(f)(1), avoid a lien against debtor's homestead property, which lien was granted in a contested divorce action to secure an equalizing payment upon property division.

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STATEMENT OF FACTS

A. Procedural Status.

Gerald J. Sanderfoot filed a petition for relief pursuant to Chapter 7 of the United States Bankruptcy Code on May 4, 1987, in the United States Bankruptcy Court for the Eastern District of Wisconsin (App. at 44a). As part of Mr. Sanderfoot's schedules, he listed his homestead property located in Hortonville, Wisconsin (App. at 48a) and claimed the same as exempt pursuant to Section 815.20, Wisconsin Statutes.[1]

Mr. Sanderfoot's schedules reflect two (2) mortgages against his homestead and a lien awarded to his ex-wife, Jeanne Farrey, formerly known as Jeanne Sanderfoot, petitioner herein (App. at 47a). That lien was granted by the Circuit Court for Outagamie County, Wisconsin in a judgment of divorce between Mr. and Mrs. Sanderfoot (App. pp. 49a-61a) for purposes of equalizing a property division. As the lien impaired Mr. Sanderfoot's homestead exemption, a motion to avoid the lien pursuant to 11 USC Sec. 522(f)(1) was filed on June 8, 1987. On June 25, 1987, Ms. Farrey objected to the lien avoidance.

The Bankruptcy Court, the Honorable Margaret Dee McGarity presiding, issued a written decision denying Mr. Sanderfoot's motion [*In re Sanderfoot*, 83 BR 564

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[1] Pursuant to 11 USC Sec. 522(b), a debtor in a bankruptcy case may choose between the "federal" exemptions provided for in 11 USC Sec. 522(d), or those exemptions provided for in the state of domicile, unless the law of the state of domicile specifically provides that the "federal" exemptions are not available. Wisconsin has not opted out of the federal system.

(Bankr. E.D. Wis 1988), App. p. 25a]. Upon appeal to the United States District Court for the Eastern District of Wisconsin, the Bankruptcy Court's decision was reversed [*In re Sanderfoot*, 92 BR 802 (E.D. Wis 1988), App. p. 22a]. The United States Court of Appeals for the Seventh Circuit affirmed the District Court [*In re Sanderfoot*, 899 F2d 598 (7th Circuit, 1990), App. p. 1a].

This Court granted Ms. Farrey's petition for certiorari on November 27, 1990.

B. Facts of the Case.

Gerald J. Sanderfoot and Jeanne Farrey (Sanderfoot) were married on August 12, 1966, and divorced on September 12, 1986 (App. pp. 44a-59a and attached to the Statement of Stipulated Facts in the District Court). The divorce action had been commenced in 1984 in the Circuit Court for Outagamie County, Wisconsin.

The divorce was contested on all issues, including child support, separate maintenance and property division. Judgment of divorce and property division was granted by the trial court on September 12, 1986. [See Section 806.06(1)(d), Wisconsin Statutes.] The written judgment was entered on February 5, 1987. [See Section 806.06(1)(h), Wisconsin Statutes.] The judgment of divorce terminated the marital status of the parties and fixed their respective financial rights effective September 12, 1986, pursuant to Section 767.37(3), Wisconsin Statutes, *Brandt v. Brandt*, 145 Wis 2d 394, 421, 427 NW 2d 126 (Wis. App. 1988).

As part of the divorce judgment, the Circuit Court awarded the parties' homestead, business and various personal property to Mr. Sanderfoot. Ms. Farrey was awarded various personal property and, to equalize the property division, the sum of $29,208.44.[2] Mr. Sanderfoot was also "awarded" in excess of $78,000.00 of debt with Ms. Farrey being "awarded" $999.10 of debt (App. pp. 60a-61a).

The trial court provided that Mr. Sanderfoot was to make the balancing payment to Ms. Farrey of $29,208.44 in two installments, due on January 10 and April 10, 1987. The Court awarded Ms. Farrey a lien as follows:

> "The petitioner herein shall have a lien against the real estate of the respondent for the total amount of money due her pursuant to this order of the Court, i.e. $29,208.44, and said lien shall remain attached to the real property of the respondent until the total amount of money is paid in full. Specifically, the lien shall attach to the house/real estate of the respondent located at 540 Island Road, Route 2, Hortonville, Town of Greenville, Outagamie County, Wisconsin, and more specifically and legally described as . . . (legal description omitted)" (App. p. 57a).

Eight months after the granting of the judgment of divorce, Mr. Sanderfoot filed the bankruptcy petition. The sequence of events leading up to this Court granting Ms.

---

[2] Section 767.255, Wisconsin Statutes, presumes an equal division of marital estate, subject to various statutory factors, none of which is relevant herein. Additionally, Section 767.255 provides: " . . . the Court shall divide the property of the parties and divest and transfer the title of any such property accordingly."

Farrey's petition for certiorari is set forth in Subsection A of this statement.

The objection of Ms. Farrey to the lien avoidance motion also contained an objection to Mr. Sanderfoot's valuation of the real estate in the bankruptcy, claiming the Bankruptcy Court was bound by the value determined by the divorce court on September 12, 1986 (App. p. 25a). The Bankruptcy Court ruled that it was not bound (App. p. 37a). There was no objection to the claim of exemptions filed pursuant to Bankruptcy Rule 4003(b). Additionally, no creditor, including Ms. Farrey, filed any adversary action pursuant to 11 USC Sec. 523(c) or 11 USC Sec. 727. Mr. Sanderfoot was granted a discharge on February 10, 1989.

SUMMARY OF ARGUMENT

The Seventh Circuit Court of Appeals, in deciding this case, examined and analyzed the requirements of 11 USC Section 522(f)(1), providing for avoidance of judicial liens which impair a debtor's exemptions. The starting point of any such inquiry is the language of the statute itself. The decision of the Seventh Circuit adopts the rational of the *In re Pederson*, 875 F2d 781 (9th Cir. 1989), line of cases.

That line of cases holds that when a divorce court grants a lien upon the homestead of the debtor to secure payment of property division, such a lien meets the three requirements of Section 522(f)(1) and is avoidable. Petitioner has argued that such a lien does not fix upon an

interest of the debtor and that the lien does not impair debtor's exemptions and is thus nonavoidable.

Petitioner's argument ignores the discretion vested in the divorce court to " . . . divest and transfer the title . . . " to marital property (Section 767.255, Wisconsin Statutes) and the clear language of the judgment of divorce which awarded the homestead real estate to Mr. Sanderfoot. In making that award, the divorce court extinguished the pre-existing property rights and created new rights.

The new rights created by court order were sole ownership of various property in Mr. Sanderfoot and a debt of $29,208.44 owed by Mr. Sanderfoot to Ms. Farrey, secured by a lien. The lien attached to his interest, as no one else had any.

Ms. Farrey further argues that because Wisconsin treats a lien in a divorce judgment "like a mortgage" for purposes of joint tenancy survivorship, it is "like a mortgage" for all purposes. Ms. Farrey ignores the factual differences in the case at bar and the specific provisions of Section 815.20(1), Wisconsin Statutes, providing that a homestead is exempt from the " . . . lien of every judgment . . . . "

However, regardless of how Wisconsin may treat the lien, it is federal law rather than state law which will determine avoidability of a lien under Section 522(f)(1). Since the Bankruptcy Code itself defines all of the necessary terms and Mr. Sanderfoot's homestead would be exempt "but for" the judicial lien, the second and third requirements of Section 522(f)(1) are met.

The legislative history of 11 USC Section 522(f), taken with the provisions of 11 USC Section 522(c) and 11 USC Section 523(a)(5), clearly demonstrates that Congress did not intend to treat contested property division judgment liens differently from any other judgment lien.

Rather than seeking to implement the plain language of the statute and the intent of Congress, Ms. Farrey seeks to have this Court determine policy which must be determined by Congress and not the courts.

ARGUMENT

The sole issue presented in this matter is whether a lien granted in a contested divorce to a former spouse to balance a property division is a judicial lien, voidable pursuant to 11 USC Sec. 522(f)(1). The issue resolves itself to a question of what does the applicable statute mean and what was Congress's intent.

I. EACH OF THE ELEMENTS OF 11 USC SECTION 522(f)(1) HAVE BEEN ESTABLISHED IN THIS CASE SO THAT THE LIEN AWARDED IN THE CONTESTED DIVORCE ACTION IS AVOIDABLE.

As conceded by petitioner, the beginning point is the language of the statute. *United States v. Ron Pair Enterprises, Inc.*, 489 US 235, 241 (1984). Br. at 18. Section 522(f)(1) reads, in its entirety, as follows:

> "(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to

> which the debtor would have been entitled under subsection (b) of this section, if such lien is –
>
> (1) a judicial lien;"

The language above set forth gives rise to three requirements:

1. The lien must fix on an interest of the debtor in property;
2. The lien must impair an exemption to which the debtor would otherwise be entitled; and
3. The lien is a judicial lien.

Petitioner alleges that the first two elements are not met and does not discuss the third.

A. The Lien of the Divorce Judgment Fixed Upon an Interest of Mr. Sanderfoot Because No One Else Had an Interest at the Time of the "Fixing" of the Lien.

Petitioner argues that "(t)he lien should not be avoided because it did not fix on the debtor's pre-existing property interest" (Br. at p. 18). This argument adopts the rationale of the line of cases represented by *Boyd v. Robinson*, 741 F2d 1112 (8th Cir. 1984). The argument of petitioner and the *Boyd* line of cases, however, ignores the very clear change in property rights effected by a judgment of divorce and the provisions of Section 767.255, Wisconsin Statutes, allowing the divorce court to " . . . divest and transfer the title . . . " of marital property. See Footnote No. 2.

Prior to the judgment of divorce, the parties held title to the real estate in joint tenancy, each holding a pre-

existing undivided one-half interest. At the point that the divorce court issued its property division determination, those property rights were wholly extinguished and new rights were put into place.[3] Those new rights were as follows:

A. Outright ownership of the "real estate – house" and various other assets to Mr. Sanderfoot (Judgment of Divorce, App. p. 51a), free and clear of the rights of Ms. Farrey (Judgment of Divorce, App. p. 58a).

B. Ms. Farrey was given, in place of her pre-existing rights, various assets and a debt of $29,208.44, secured by lien on Mr. Sanderfoot's property (Judgment of Divorce, App. pp. 56a-57a).

Thus, as Judge Ross stated in his dissent in *Boyd v. Robinson*, 741 F2d at 1115:

> "What had been a property interest became simply collateral for a debt. Since the house was simultaneously vested solely in *Boyd*, the lien *must* have attached to her interest in the house, for no one else possessed any ownership interest in the house."

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[3] Both the Bankruptcy Court in its decision (App. p. 32a) and Ms. Farrey in her brief seem to contend that Wisconsin's Marital Property Act, Chapter 766, Wisconsin Statutes, is relevant or somehow controlling regarding divesture of ownership by divorce decree. *Kuhlman v. Kuhlman*, 146 Wis 2d 588, 432 NW 2d 295 (Wis. App. 1988), holds that the Wisconsin Marital Property Act " . . . has nothing to do with division of property on dissolution of a marriage" (p. 591). Additionally, Section 766.75, Wisconsin Statutes, clearly provides that the divorce decree will control. In this case, the divorce court clearly terminated the parties marital property interests and created sole ownership in Mr. Sanderfoot. See Judgment of Divorce, App. p. 51a.

See also *In re Pederson*, 875 F2d 781 (9th Cir. 1989); *Maus v. Maus*, 837 F2d 935 (10th Cir. 1988); and *In re Sanderfoot*, 899 F2d 598 (7th Cir. 1990).

It is difficult, if not impossible, to understand how Ms. Farrey's lien does not attach to "an interest" of Mr. Sanderfoot. Based upon the language of the judgment of divorce, the trial judge believed it attached to his interest, for the lien is " . . . against the real estate property of the Respondent . . . " (Judgment of Divorce, App. p. 57a).

Ms. Farrey argues that "(h)ad the lien been awarded either one day *before* or one day after the divorce on his title, the lien might be subject to the avoidance statute" (Br. p. 19). But how long must title be vested – one minute, one hour? Once the Court made its pronouncement of the award of assets, title as *between these parties* vested solely in Mr. Sanderfoot (See Footnote No. 2). The trial court, after significant discussion of the awarding of various other assets and assignment of debt, clearly recognized the effect of the award and provided for a balancing payment based upon the *entire* property division and then provided for a lien upon *Mr. Sanderfoot's* property to equalize the entire property division.

In determining if this first element is met, it is important to recognize that the code provides that a lien can be avoided if it is fixed " . . . on *an* interest . . . " of the debtor. The code does not say fixed on the interest or upon the sole interest, but on "an" interest of the debtor.

Based upon Ms. Farrey's own argument, Mr. Sanderfoot had "an" interest in the property based upon the joint ownership. Once she was divested of her interest by the divorce court, the only person with any incident of

ownership is Mr. Sanderfoot, for a lien, even a mortgage lien, does not vest legal or equitable title in the lien holder.[4] Thus, the lien must attach to Mr. Sanderfoot's interest, as Ms. Farrey's ownership interest terminated with the Court granting sole ownership to Mr. Sanderfoot.

Ms. Farrey attempts to equate the facts of this case with *In re Owen*, 877 F2d 44 (11th Cir. 1989), argued before this Court on November 5, 1990. The facts are significantly different. In *Owen*, Helen Owen obtained a judgment against Dwight Owen (debtor) on December 1, 1975 and recorded the same on July 29, 1976. In November, 1984, Dwight Owen purchased a condominium as his home. In 1984, Florida's exemption law applied only to the head of a family and only if the lien came into existence after the property attained homestead status. *Owen*, at pp. 45-46; Fla. Const. at 10, Sec. 4; Fla. Stat. Sec. 222.20.

The 11th Circuit refused to apply Section 522(f)(1) because the laws of the State of Florida provided that Mrs. Owen's lien " . . . attached to the property before the debtor was able to avail himself of the homestead right" (*Owen*, at p. 47). This is because at the time Mr. Owen purchased the condominium he was not entitled to a

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[4] Wisconsin follows the lien theory of mortgages. The full ownership, both equitable and legal, is in the mortgagor, and the interest of the mortgagee is that of a lien holder. The mortgagee is merely the holder of a security interest. *Glover v. Marine Bank of Beaver Dam*, 117 Wis 2d 684, 691-92, 345 NW 2d 449 (1984). See also Section 708.01, Wisconsin Statutes. This is not to admit that Ms. Farrey holds a mortgage as she has argued. See Section IB of this argument.

homestead exemption under Florida law[5] (*Owen*, at p. 47).

In the present case, there is no issue of the premises being Mr. Sanderfoot's homestead pursuant to Sections 815.20(1) and 990.01(14). Wisconsin Statutes. *In re Owen*, 877 F2d 44 (11th Cir. 1989), is simply irrelevant to this case based upon its facts and the applicable law.

Ms. Farrey argues that Mr. Sanderfoot " . . . never, not even for a moment, . . . (had) sole title to the real estate" (Br. p. 23). Ms. Farrey counts in milliseconds rather than looking at the clear effect of the judgment of divorce and the statutory provisions of Section 767.255 – vesting of sole ownership of the real estate in Mr. Sanderfoot; adding and subtracting assets and debt, dividing assets and the debt and finally awarding Ms. Farrey an amount of money to balance the property division, to be secured by a lien on *Mr. Sanderfoot's* real estate. Such a lien clearly impairs "an interest" of Mr. Sanderfoot in property for, at the point of the granting of the lien, Mr. Sanderfoot is the only person with any ownership interest in the property.

B. While State Law Will Determine the Definition of "Homestead" For Exemption Purposes, Federal Bankruptcy Law Will Determine the Avoidability of a Lien Pursuant to Section 522(f).

The second requirement of Section 522(f)(1) is that the lien must impair an exemption to which the debtor

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[5] Florida has "opted out" of the Federal exemptions. Fla. Stat. Sec. 220.20.

would otherwise be entitled. Until the brief filed by Ms. Farrey before this Court, "(n)either party nor the courts below focus(ed) on this aspect of the lien avoidance statute." *In re Sanderfoot*, 899 F2d 598 (7th Cir. 1990); App. p. 11a. We believe that this challenge has been waived. Assuming, however, that it has not been waived, Ms. Farrey asks too much.

She argues that the lien in the divorce judgment is a mortgage and not subject to the Wisconsin homestead exemption, citing *Wozniak v. Wozniak*, 121 Wis 2d 330, 359 NW 2d 147 (1984). Br. p. 24. As pointed out by Ms. Farrey, *Wozniak* is a case involving a question of *enforcement* of a judicial lien created in a divorce judgment against a surviving joint tenant who was not a party to the divorce. Br. p. 24.

The facts in *Wozniak* demonstrate that it is not applicable to a question of homestead exemption: Opal Wozniak owned a house in joint tenancy with her grandson. In a divorce action, William Wozniak was awarded a lien upon her interest in that non-homestead property:

> "As part of the divorce judgment, the trial court awarded Opal her interest in the property '(s)ubject to a lien to William J. Wozniak to secure payment to him of the sum of $8,817.38 . . . and further providing that in the event of a suit for foreclosure of said lien, expenses of such foreclosure including but not limited to taxable costs and attorney fees.' " (At p. 336.)

Opal died, and William commenced a foreclosure action. The surviving joint tenant intervened. In finding that the surviving joint tenant took decedent's property subject to the lien, the Court looked at Section 700.24,

Wisconsin Statutes; the language of the divorce judgment (providing for interest and foreclosure) and the provisions of Chapter 767, Wisconsin Statutes. No issue was raised regarding homestead exemption or Section 815.20, Wisconsin Statutes, because *Wozniak* is an enforcement case, not an exemption case.[6] It should also be noted that there is no indication in *Wozniak* as to whether the divorce was stipulated or contested.[7]

While there are several differences between the *Wozniak* language and the judgment in the *Sanderfoot* divorce, two are critical:

1. There is no interest rate determined by the trial court in Sanderfoot.
2. There is no indication that foreclosure is an allowable remedy for Ms. Farrey.

The *Wozniak* decision indicates that several factors demonstrate that the trial judge intended to give Mr. Wozniak a mortgage by awarding him a lien upon specific property, for a specific sum of money due on a specific date, setting an interest rate and providing for foreclosure as a remedy. *Wozniak*, 121 Wis 2d at 336-37.

At the close of the decision in *Wozniak*, the Wisconsin Supreme Court admonished divorce courts, at p. 337:

> "To avoid the problem created by the judgment in this case, trial courts should specify in the divorce judgment the type of lien awarded."

---

[6] There is no indication in the *Wozniak* decision that the premises was the surviving joint tenant's homestead.

[7] The decision notes that the divorce judgment was not made a part of the record. *Wozniak*, 121 Wis 2d at 332, Footnote No. 1.

In the only case reported which cites the lien portions of *Wozniak*,[8] the Wisconsin Supreme Court indicated that the trial court should clearly specify the type of lien it was awarding. In *Lutzke v. Lutzke*, 122 Wis 2d 24, 48, 361 NW 2d 640 (1985), the Court stated:

> "It appears to us that, in the event (the trial judge) declares the intent of the judgment – whether the obligation is personal or not, whether the joint tenancy is severed or not – he will then be in a position to state with specificity the nature of the obligation and whether it is a mere judgment debt or whether it results in some security lien upon whatever share of the property inures to Vallerie Lutzke. See *Wozniak v. Wozniak*, 121 Wis 2d 330, 359 NW 2d 147."

Like *Wozniak*, the *Lutzke* case is a survivorship case under Section 700.24, Wisconsin Statutes, and not a claim for homestead exemption per Section 814.20, Wisconsin Statutes.

Ms. Farrey would have this Court interpret all awards in a divorce judgment as constituting a mortgage for all purposes. As pointed out previously, the only cases so finding are limited to survivorship rights pursuant to Section 700.24, Wisconsin Statutes. There is no mention of Section 815.20, Wisconsin Statutes, in either case. In comparing the two statutes, there is a significant difference.

The relevant portion of Section 815.20(1), Wisconsin Statutes, states:

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[8] The only other reported case, *Haack v. Haack*, 149 Wis 2d 243, 440 NW 2d 794 (Wis. App. 1989), cites *Wozniak* as authority for the broad discretion vested in a divorce court.

> "(1) An exempt homestead as defined in s. 990.01(14) selected by a resident owner and occupied by him or her shall be exempt from execution, from the lien of every judgment and from liability for the debts of the owner to the amount of $40,000, except mortgages, laborers', mechanics' and purchase money liens and taxes and as otherwise provided."

Section 700.24 states:

> "A real estate mortgage, a security interest under Chapter 409, or a lien under Sections 71.91(5)(b), 72.86(2), Chapters 49 or 779, on or against the interest of a joint tenant does not defeat the right of survivorship in the event of the death of such joint tenant, but the surviving joint tenant or tenants take the interest such deceased joint tenant could have transferred prior to death subject to such mortgage, security interest or statutory lien."

The two statutes clearly protect different rights, one the rights of joint tenants in *any* real property (Section 700.24) and the other the rights in the owner/occupier of real property which is a homestead. That distinction is brought into sharper focus by the inclusion in Section 815.20(1) of language specifically exempting " . . . the lien of every judgment. . . . " Such language is missing in Section 700.24.

Regardless of how judgment liens are treated in survivorship issues or in enforcement cases, for exemption cases, the lien of *every* judgment is exempt as to homestead property up to the applicable statutory limit. It cannot be seriously argued that the lien imposed herein is not the lien of a judgment. Section 806.15, Wisconsin Statutes.

To argue, as Ms. Farrey does, that " . . . a mortgage, in Wisconsin, is not subject to the homestead exemption even if it has been created by a judicial lien" (Br. at p. 24) totally ignores the clear exemption for the lien of *every* judgment contained in Section 815.20(1), Wisconsin Statutes (emphasis added).

While we believe that a judicial lien is exempt pursuant to the plain language of Section 815.20(1), Wisconsin Statutes [and that the holding in *Wozniak v. Wozniak*, 121 Wis 2d 330, 359 NW 2d 147 (1984), must be limited to its facts], it is respectfully submitted that federal law will determine avoidability of the lien pursuant to Section 522(f) rather than state law.

Section 522(f) states, in part, that a lien may be avoided if it " . . . impairs an exemption to which debtor *would have been* entitled under subsection (b) of this section, if such lien is –

(1) a judicial lien."

This clause of Section 522(f) clearly means that a debtor can avoid a lien if it impairs an exemption to which the debtor would have been entitled *but for the lien*. See *In re Pederson*, 78 BR 264 (Bankr. 9th Cir. 1987) affirmed; *In re Pederson*, 875 F2d 781 (9th Cir. 1989). Thus, a lien which fits the Bankruptcy Code's definition of "judicial lien" is avoidable as to property which it would otherwise encumber. While state law will determine *what* property is exempt (i.e. the definition of homestead), federal law will determine the avoidability of the lien pursuant to Section 522(f). *In re Heape*, 886 F2d 280, 282 (10th Cir. 1989). See also *McKenzie v. Irving Trust Co.*, 323 US 365, 369 (1945).

Such a reading of Section 522(f) is consistent with the mandate of Article 1, Section 8, of the United States Constitution, providing for "uniform laws on the subject of bankruptcies throughout the United States."[9] By adopting Ms. Farrey's "like a mortgage" argument, the various states could, by calling a judgment lien a mortgage, frustrate the provisions of Section 522(f) and render them useless. Such a situation would result not in uniform laws but a hodgepodge of contradictory laws leading to havoc. *In re Sanderfoot*, 899 F2d at 600, App. p. 15a.

C. The Lien is a Judicial Lien Pursuant to 11 USC Section 101(32).

The last element of Section 522(f) is whether or not the lien of the divorce judgment is a judicial lien. Ms. Farrey does not take the position that it is not, as 11 USC Section 101(32) clearly provides that it is. The last element is met.

II. THERE IS NOTHING IN THE PLAIN LANGUAGE OF SECTION 522(f) NOR IN THE LEGISLATIVE HISTORY TO SUGGEST THAT CONGRESS INTENDED THAT A CONTESTED DIVORCE JUDGMENT IS TO BE TREATED DIFFERENTLY FROM ANY OTHER JUDGMENT.

Mr. Sanderfoot urges adoption of what we have called the *Pederson* line of cases [*In re Pederson*, 875 F2d

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[9] Such a reading is also consistent with and harmonizes Section 522(c) regarding property liable for debts incurred before filing and with the intent of Congress. See Section II of this argument.

781 (9th Cir. 1989)], while Ms. Farrey exposes the *Boyd* line of cases [*Boyd v. Robinson*, 741 F2d 1112 (8th Cir. 1984)]. It is respectfully submitted that the *Pederson* line of cases presents a clear, concise and logical interpretation and harmonizing of various Bankruptcy Code sections, including:

A. 11 USC Section 522(f) – Lien Avoidance;

B. 11 USC Section 101(32) – Definition of Judicial Lien;

C. 11 USC Section 101(33) – Definition of Lien;

D. 11 USC Section 101(44) – Definition of Security Agreement;

E. 11 USC Section 101(45) – Definition of Security Interest;

F. 11 USC Section 522(c) – Property Liable for Debt;

G. 11 USC Section 523 – Exceptions to Discharge; and

H. 11 USC Section 727 – Discharge.

The *Boyd* line of cases, on the other hand, presents a convoluted attempt to ignore the clear meaning of the above referred to sections. The *Boyd* cases represent an attempt by the various courts to bend the Bankruptcy Code to meet their perception of justice in a divorce case rather than applying the clear and unambiguous language of the relevant code provisions.

Ms. Farrey goes to great lengths to argue that the decision of the Seventh Circuit Court conflicts with the clear meaning of the statute, the purpose and legislative history of Section 522(f)(1) and the Bankruptcy Code itself. As previously argued, the statute is clear. It is the

cases, finding liens in contested divorces nonavoidable, which are unclear.

A. The Literal Application of Section 522(f) Will Not Produce a Result Different From That Intended by Congress.

This Court has previously heid that where courts are presented with a dispute over the meaning of a statute and the statute's language is plain, "the sole function of the courts is to enforce it according to its terms," and that plain meaning " . . . should be conclusive, except in the 'rare cases [which] the literal application of the statute will produce a result demonstrably at odds with the intention of its drafters.' " *United States v. Ron Pair Enterprises*, 489 US 235 (1984). In the instant case, the plain meaning of Section 522(f) is not demonstrably at odds with the intent of Congress.

What was Congress's intent in enacting Section 522(f)? The legislative history of Section 522(f) reveals two (2) entries:[10]

1. Senate Report No. 95-989 at 77, 1978, U.S. Code Congressional and Administrative News at p. 5862 states: "Subsection (f) protects the debtor's exemptions, his discharge and thus his fresh start by permitting him to avoid certain liens on exempt property. The debtor may avoid a judicial lien on any property to the extent that the property could have been exempted in the absence of

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[10] Ms. Farrey's brief, at p. 29, indicates that the *only* legislative history is in H.R. Rep. No. 595, at 126-27, 1978.

the lien, and may similarly avoid a non-purchase-money security interest in certain household and personal goods. The avoiding power is independent of any waiver of exemptions."

2. H.R. Rep. No. 95-595 at 126-27, 1978, U.S. Code Congressional and Administrative News at pp. 6087-88 states: "In addition, the bill gives the debtor certain rights not available under current law with respect to exempt property. The debtor may void any judicial lien on exempt property, and any nonpurchase money security interest in certain household goods. The first right allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists to provide relief for an overburdened debtor. If a creditor beats the debtor in to court, the debtor is nevertheless entitled to his exemptions."

Ms. Farrey neglects to read both of the above quoted items of legislative history with the provisions of Bankruptcy Act Section 67a and the final form of Section 522(f). While the House Report contains a "race to the courthouse" reference, the Senate Report does not nor does Section 522(f).

This is significant when examining the final form of Section 522(f) in light of the provisions of Bankruptcy Act 67a [11 USC 107(a)]. 11 USC Section 107(a)(1) (1976), provided:

> "(a)(1) Every lien against the property of a person obtained by attachment, judgment, levy or other legal or equitable process or proceeding within *four months before the filing of a petition* initiating a proceeding under this title by or

> against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was *insolvent* or (b) if such lien was sought and permitted in fraud of the provisions of this title: *Provided, however,* that if such person is not finally adjudged a bankruptcy in any proceeding under this title and if no arrangement or plan is proposed and confirmed, such lien shall be deemed reinstated with the same effect as if it had not been nullified and voided." Emphasis added.

Section 107(a)(1) had three (3) primary requirements:

A. That the lien had been obtained by attachment, judgment, levy or other legal or equitable process or proceeding;

B. That the lien must have been obtained within four months of the filing; and

C. That the judgment debtor had to be insolvent when the lien was taken.

Section 522(f) of the Bankruptcy Code totally eliminated two of the three qualifiers. Had Congress intended the "race to the courthouse" provision to be a part of the Code, the language of 107(a) on time limits would have been retained. Insolvency when the judgment is entered was also eliminated.[11] Thus, the sole intent of Congress was to permit avoidance of a judicial lien upon meeting the three criteria of Section 522(f), regardless of when the judgment was obtained or the solvency of the debtor when the judgment was taken.

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[11] The "definition" of judicial lien contained in 11 USC 107(a) (1976) is almost identical to 11 USC Section 101(32).

Ms. Farrey overreaches when arguing that it was the intent of Congress to protect "the debtor's 'fresh start' from (only) the predatory credit practices" of judicial lien creditors. Br. p. 30. Such an intent cannot be read into Section 522(f). There is no time limit or insolvency requirement as in 11 USC 107(a)(1) (1976). There is no requirement that execution, garnishment or other realization upon the judgment be instituted or imminent to allow avoidance Rather, Section 522(f) permits avoidance of the operation of any judgment lien "on any property to the extent that the property could have been exempted in the absence of the lien." Senate Report No. 95-989, at 77, 1978. U.S. Code Congressional and Administrative News at p. 5862.

Rather than being at odds with the express intent of Congress, the decision of the Seventh Circuit reflects that intent.

The intent of Congress can also be seen in the provisions of 11 USC Section 522(c) and 11 USC Section 523. Section 522(c) provides that exempt property is not liable for any debt which arose before filing except for taxes [523(a)(1)]; maintenance or support [523(a)(5)]; debts secured by liens not avoided pursuant to Sections 522(f) and (g), 506(d), 544, 545, 547, 548, 549 or 724(a) and tax liens.

Section 523 sets forth the debts which are or may be nondischargeable. Simply because a debt may be found to be nondischargeable pursuant to Section 523, does not result in the lien avoidance provisions of Section 522(f) being inapplicable. Indeed two courts have held that the

lien of a debt determined to be nondischargeable pursuant to Section 523(a)(4) and (a)(6) are avoidable. See *In re Walters*, 879 F2d 95 (3rd Cir. 1989), and *In re Hampton*, 104 BR 527 (Bankr. M.D. Georgia 1989). The only prepetition debts from which exempt property is not insulated are taxes, alimony, maintenance and support. Section 522(c)(1). Senate Rep. No. 95-989, 1978, U.S. Code Congressional and Administrative News, 5787, 5862, H.R. Rep. No. 95-595, 1978 U.S. Code Congressional and Administrative News 6317.

The award to Ms. Farrey by the Circuit Court for Outagamie County is for a property division. There was never a claim by Ms. Farrey that it was anything but a debt due for a balancing payment on property division. As conceded by Ms. Farrey, the debt is dischargeable. Br. at p. 34.

The dischargeability or nondischargeability of the property division is not, however, the issue in this case. Nor is there an issue of denial of discharge pursuant to 11 USC Section 727(a).[12] The issue in this case is whether a

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[12] The concept of nondischargeability of a specific debt pursuant to 11 USC 523 is considerably different from denial of a discharge pursuant to 11 USC 727(a). In this case, no adversary proceeding was brought by anyone, including Ms. Farrey, contesting the granting of Mr. Sanderfoot's discharge. Such an adversary proceeding is required by 11 USC Section 727(c)(1), (d) and (e). Bankruptcy Rule 4004 sets forth the procedure for filing a complaint objecting to discharge. Contrary to Ms. Farrey's argument, unless the debtor is not an individual, a complaint objecting to discharge has been timely filed or debtor filed a waiver of discharge, the bankruptcy court *shall* grant the discharge. Bankruptcy Rule 4004(c).

lien imposed in a contested divorce action is a judicial lien subject to avoidance pursuant to Section 522(f)(1). If a discharge is denied or revoked pursuant to Section 727, there is no issue, for the provisions of Section 522(f) would not apply. If a debt is deemed nondischargeable based upon fraud, the lien of a judgment is still avoidable [*In re Walters*, 879 F2d 95 (3rd Cir. 1989)], but post-petition property is liable for its satisfaction. If a debt is nondischargeable because it is maintenance, alimony or child support as defined in Section 523(a)(5), debtor's prepetition property would be liable for the debt pursuant to Section 522(c)(1). Congress clearly chose not to treat property division differently from ever other judgment.

B. The Reading of Section 522(f)(1) Proposed by Ms. Farrey Invades the Legislative and Policy Prerogatives of Congress.

What Ms. Farrey is actually seeking is to have this Court impose upon Section 522(f)(1) an exception not in the plain language of the statute nor capable of being placed in the statute through Congressional intent or through longevity of precode practice. Had Congress intended liens for property division payments in contested divorces to be treated differently from other judicial liens, it would have so stated in clear terms. For whatever reason, Congress did not, through nearly a decade of work on the Code, do so.

Indeed, to this day Congress has not modified the language applicable in this case. Congress has stated a

policy – judicial liens are avoidable if such a lien meets the criteria of Section 522(f).

The policy itself or the wisdom of the policy is addressed to Congress, not the courts. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 US 837 (1984). To read into the Bankruptcy Code the exception Ms. Farrey seeks does violence not only to the Code itself but invades the prerogatives of Congress in the legislative process.

Ms. Farrey has made much of the convergence of state domestic relations law and bankruptcy law. This convergence was recognized by Congress with the resultant protection of dependent spouses and children through the provisions of Sections 522(c) and 523(a)(5). To impose an exception for property division liens goes too far.

While the result may be harsh, many results in the application of bankruptcy are harsh. Contracts are impaired through the provisions of Section 522(f)(2); individuals and businesses which have provided services to or lent money to debtors are unable to collect; state laws allowing for judicially imposed remedies cannot be enforced.

While the result of properly interpreting the Bankruptcy Code may be harsh, it does not strip the state divorce courts of their broad discretion nor would giving effect to the clear language of Section 522(f) threaten the integrity of the court system.

The divorce courts in Wisconsin and, we believe, in every jurisdiction are vested with considerable discretion

in making property divisions. These courts can fashion remedies which will protect all of the parties to a divorce while recognizing the potential intrusion of bankruptcy, just as they recognize the effect of tax laws.

Contrary to Ms. Farrey's position, affirming the Seventh Circuit decision will not necessarily result in the abuses Judge Posner foresaw, as there are ample tools in the Bankruptcy Code itself for "ferreting out abuses." *In re Pederson*, 875 F2d at 784.

CONCLUSION

Congress has framed a uniform law regarding bankruptcies, based upon Article 1, Section 8, and Article 6 of the United States Constitution. As part of that law, Congress has stated that judicial liens may be avoided if:

A. The lien fixes upon an interest of the debtor;

B. The lien impairs an exemption the debtor would have been entitled to but for the lien; and

C. The lien is a judicial lien as defined in the Bankruptcy Code.

The lien of the judgment of divorce granted to the parties clearly meets each of the above provisions. The

decision of Seventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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